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No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

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SUPREME COURT U.S.
POLICE DEPARTMENT

Charles Thomas Dickerson,

Petitioner,

v.

United States of America,

Respondent.

2242

On Petition for Writ of Certiorari To the United States Court of Appeals For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 30, 1999

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99-5525
Dickerson
v.
U.S.

QUESTIONS PRESENTED

No. 1: Whether the passage of 18 U.S.C. § 3501 was an unconstitutional attempt by Congress to legislatively overrule the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966)?

No. 2: Whether the Court of Appeals for the Fourth Circuit erred in considering *sua sponte* the applicability of 18 U.S.C. § 3501 when the issue was not properly raised and preserved by the government?

No. 3: Whether the Court of Appeals for the Fourth Circuit erred in reversing the trial court's ruling that evidence obtained during a search of the petitioner's home had to be suppressed as it was obtained pursuant to a facially deficient warrant which failed to state with particularity the items to be seized?

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CITATIONS TO OPINIONS AND ORDERS

This petition seeks review of the Fourth Circuit's decision in United States v. Charles T. Dickerson, 166 F.3d 667 (4th Cir. 1999), filed February 8, 1999. The opinion is included as Appendix A. The Fourth Circuit's decision reversed an unpublished decision of the United States District Court for the Eastern District of Virginia, United States v. Charles T. Dickerson, Criminal No. 97-159-A (E.D.Va. July 1, 1997), granting, in part, Mr. Dickerson's Motion to Suppress. The district court's Order and Memorandum Opinion are included as Appendix B. Following the district court's ruling, both the government and the petitioner filed motions asking the court to reconsider aspects of its initial ruling. The district court denied both motions. The decision, issued August 4, 1997, is reported at 971 F. Supp. 1023 (E.D.Va. 1997) and is attached as Appendix C.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion on February 8, 1999. The petitioner filed a Petition for Rehearing and Petition for Rehearing *En Banc* which the Fourth Circuit denied on April 1, 1999.[1] On June 14, 1999, the petitioner applied for an extension of time in which to file a Petition for Writ of Certiorari. On June 17, 1999, the Chief Justice extended the time to and including July 30, 1999.

Pursuant to Rule 29 of the Rules of the United States Supreme Court, this Petition for Writ of Certiorari was timely filed on or before July 30, 1999. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

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[1] In its Brief for the United States in Support of Partial Rehearing *En Banc*, the government agreed with and supported the petitioner's position that 18 U.S.C. § 3501 was unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States
Amendment V: Rights of Accused in Criminal Proceedings

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall nay person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * *

18 U.S.C. § 3501
Admissibility of Confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or District of Colombia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

* * * * *

Constitution of the United States
Amendment IV: Security from Unwarrantable Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Federal jurisdiction arose in the district court when, on January 28, 1999, the petitioner, Charles T. Dickerson, was arrested and charged by criminal complaint with one count of aiding and abetting a bank robbery in violation of 18 U.S.C. §§ 2 and 2113(a) and (d). On April 16, 1997, Mr. Dickerson was indicted by a federal grand jury in the Eastern District of Virginia on one count of conspiracy to commit bank robbery in violation of 18 U.S.C. § 371, three counts of bank robbery in violation of 18 U.S.C. § 2113(a) and (d), and three counts of using a firearm during a bank robbery in violation of 18 U.S.C. § 924(c).[2]

The facts material to consideration of the questions presented in this Petition for a Writ of Certiorari are as follows:

On January 24, 1997, a NationsBank in Alexandria, Virginia was robbed. Shortly thereafter, Special Agent Christopher Lawlor of the Federal Bureau of Investigation learned that the robbery had been committed with a large, silver, semi-automatic handgun, that the robber had placed the stolen money in a black leather backpack, that approximately $876 was taken in the robbery, and that no dye-pack or bait money was given to the robber. Witnesses had seen the robber, later identified as James Rochester, leave the bank and enter an Oldsmobile Cierra. Using the description of the getaway car, including its license plate number, the FBI determined that the petitioner, Charles Dickerson, was the car's owner.

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[2] A superseding indictment was issued on June 24, 1997. It charged the same offenses except it alleged that Mr. Dickerson acted as an aider and abettor to the bank robberies and firearm offenses in violation of 18 U.S.C. § 2.

Agent Lawlor and several other law enforcement officers went to Mr. Dickerson's home at 8313 Garland Avenue, Apartment 3, in Takoma Park, Maryland. They arrived at the residence at approximately 5:30 p.m. on the evening of January 27, 1997. An Oldsmobile Cierra registered to Mr. Dickerson was parked in the vicinity. The officers set-up surveillance. After waiting over one hour, they knocked on Mr. Dickerson's door.

Approximately ten FBI agents and local police officers were outside of Mr. Dickerson's apartment with their guns drawn when Mr. Dickerson answered the door. Three or four, including Special Agent Lawlor, entered Mr. Dickerson's apartment without a warrant and without the consent of Mr. Dickerson. The officers asked Mr. Dickerson to accompany them to the FBI field office in Washington, D.C. Given the circumstances, Mr. Dickerson felt he had no choice but to do as the officers requested. He asked to retrieve his coat, turned, and walked to his bedroom. Upon reaching the room, Mr. Dickerson realized that Agent Lawlor and another officer had followed him to his bedroom from his apartment's entrance.

Mr. Dickerson picked up his coat. Under the coat was $552 in cash. Mr. Dickerson had won this money on a recent trip to Atlantic City. The agents forced Mr. Dickerson to count out this money on the bed before allowing him to put it in his pocket. No evidence linking Mr. Dickerson to the robbery of the NationsBank was observed by the officers in the apartment. Prior to leaving, Mr. Dickerson was asked to consent to a search of the residence. He refused and was driven by the officers to the FBI field office.

Once at the station, Mr. Dickerson was interviewed by Agent Lawlor and another FBI agent. He was not advised of his Miranda rights prior to this interrogation. Initially, Mr. Dickerson denied any involvement in the robbery, admitting only that he had been in the vicinity

of the bank at the time it was robbed.

After obtaining this statement, Agent Lawlor left the interrogation room and placed a call to the Honorable James E. Kenkel, United States Magistrate Judge for the District of Maryland, in order to obtain a search warrant for Mr. Dickerson's home. As probable cause for the warrant, Agent Lawlor described the circumstances of the robbery and the fact that the getaway car had been traced to Mr. Dickerson. In addition, Agent Lawlor noted that Dickerson, who had been behind on his rent, had just paid his landlord $1,350. He told the magistrate that earlier in the evening he and other officers had gone to Mr. Dickerson's home in Maryland and escorted him to the FBI Field Office in Washington, D.C. Agent Lawlor also mentioned the $552 he had seen in Mr. Dickerson's possession. Agent Lawlor then asserted that exigent circumstances necessitated an immediate search of the home because "Mr. Dickerson [was] not under arrest. . . and [was] free to go home." Agent Lawlor said he believed that if Mr. Dickerson went home, he would destroy evidence of the robbery under investigation.

During the conversation between Judge Kenkel and Agent Lawlor, no discussion took place concerning what particular items were being sought under the warrant. The warrant stated only that there was probable cause to believe "evidence of the crime of bank robbery" would be found in Mr. Dickerson's home. Judge Kenkel approved the warrant at 8:50 p.m. At the time Agent Lawlor requested the warrant, he knew the $552 was no longer in the residence but was at the FBI field office. In fact, Mr. Dickerson had allowed Agent Lawlor to count and seize the money prior to the agent's call to Judge Kenkel. Agent Lawlor had seen no other incriminating evidence in the home and "had no way of knowing" what a search might uncover. After obtaining the warrant, Agent Lawlor dispatched other officers to Mr. Dickerson's home to conduct the

search. The search uncovered a silver .45 caliber handgun, dye stained money, a bait bill from a separate bank robbery, and other evidence.

After obtaining the warrant, Agent Lawlor returned to the interrogation room and told Mr. Dickerson his home was going to be searched. Mr. Dickerson then agreed to make another statement. He told the agents he had gone to Alexandria on January 24, 1997, with a man named Jimmy. Mr. Dickerson knew Jimmy because Jimmy was married to his cousin. While in Alexandria, Mr. Dickerson said he parked his car and went into a bagel shop. Initially, Jimmy waited in the car, but as Mr. Dickerson walked away, he saw Jimmy get out of the car. When Mr. Dickerson returned to his car, Jimmy was already back in it. When Mr. Dickerson began to drive away, Jimmy told him to pull over. He complied, thinking Jimmy had to use the bathroom. Jimmy got out and returned after a few minutes. When Mr. Dickerson stopped at a stop sign, Jimmy got out of the car and put something in the trunk. When Mr. Dickerson stopped at a red light a short distance down the street, Jimmy told him to run it. It was at this point that Mr. Dickerson began to suspect that Jimmy may have committed a robbery. Mr. Dickerson knew that Jimmy had come to the Washington, D.C. area after committing a number of robberies in Georgia.

After giving this statement, Mr. Dickerson was advised for the first time of his rights under Miranda v. Arizona 384 U.S. 436 (1966). This was done using a rights waiver form which Mr. Dickerson signed. After completing this form, Mr. Dickerson was formally placed under arrest. He then left the field office with the agents and showed them Jimmy's apartment in Oxon Hill, Maryland. Based on this information, the FBI obtained the arrest of James Rochester, an individual wanted in connection with a number of bank robberies along the east coast. Following

his arrest, James Rochester admitted that he had robbed several banks, including the NationsBank in Alexandria on January 24, 1997.

On May 19, 1997, the petitioner filed a Motion to Suppress Statements and Physical Evidence. On May 30, 1997, a hearing on the Motion to Suppress was held in the United States District Court for the Eastern District of Virginia, Alexandria Division, before the Honorable James C. Cacheris. The matter was taken advisement by the district court, and, at the court's request, the parties filed supplemental memoranda in support of their positions.

On July 1, 1997, the district court issued an Order and Memorandum Opinion granting the defendant's Motion to Suppress as to his statements offered at the FBI field Office on January 27, 1997, and as to items discovered during the search of his home that same evening. The portion of the motion seeking suppression of items discovered during a search of the defendant's Oldsmobile Cierra was denied.

On July 15, 1997, the United States filed a motion asking the district court to reconsider that portion of its Order granting suppression of the defendant's statement and the items discovered in the search of his home. A hearing on the Motion to Reconsider was held on August 1, 1997. On August 4, 1997, the district court denied the United States' Motion for Reconsideration. On August 6, 1997, the district court stayed trial of this matter pending appeal by the United States. On September 2, 1997, pursuant to 18 U.S.C. § 3731, the United States noticed its appeal.

On February 8, 1999, a panel of the Fourth Circuit Court of Appeals, in a 2 to 1 decision, reversed the district court. United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999). As to Mr. Dickerson's statements, the Court ruled that, although taken in violation of the requirements of

Miranda, the statements were otherwise voluntarily made and therefore admissible pursuant to 18 U.S.C. § 3501. As to the evidence obtained from Mr. Dickerson's home, the Court ruled that the warrant's sole directive to search for "evidence of the crime of bank robbery" was sufficiently particular to pass constitutional muster, and, in any event, was relied upon in good-faith by the executing officers.

By Amended Order dated April 1, 1999, the full Fourth Circuit, by an eight to five vote, denied Mr. Dickerson's Petition for Rehearing and Petition for Rehearing *En Banc*.

ARGUMENT

I. The *Miranda* warnings are constitutionally required; therefore, passage of 18 U.S.C. § 3501 was an unconstitutional attempt by Congress to legislatively overrule the Supreme Court.

In enacting 18 U.S.C. § 3501, Congress attempted to secure the admissibility in federal courts of statements that would otherwise be suppressed under the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966). The Court has recently emphasized, however, that Congress has no power to overrule its interpretations of the Constitution. City of Boerne v. Florida, 117 S. Ct. 2157, 2163-64 (1997). As the Fourth Circuit panel opinion in this case recognized, the question of whether § 3501 or *Miranda* governs the admissibility of Mr. Dickerson's statements depends on whether Congress possesses the authority to overrule *Miranda*. Dickerson, 166 F. 3d at 672. If *Miranda* represents the Supreme Court's interpretation of the Constitution, § 3501 is invalid.

Contrary to the Fourth Circuit's conclusion, the holding of *Miranda* was deemed

constitutionally compelled by the Supreme Court. In deciding *Miranda*, the Court was not interpreting a statute, a federal rule of procedure, or a rule of evidence. Rather, the Court applied the Fifth Amendment's privilege against self-incrimination in the context of custodial interrogation and constructed a rule as a result of that application. Thus, the Court was engaging in constitutional decision making.

Proponents of § 3501 attempt to rely on Supreme Court cases referring to the *Miranda* warnings as "prophylactic" to argue that *Miranda* is not based on the Fifth Amendment and therefore can be overruled by statute. The fallacy of this position is revealed by three separate facets of Supreme Court precedent: (i) the language of *Miranda* itself; (ii) the Supreme Court's continued application of *Miranda* in state court cases; and (iii) the Supreme Court's recognition that an alleged *Miranda* violation is cognizable in federal habeas review. All three aspects of *Miranda* demonstrate that the decision is firmly based in the constitutional guarantees of the Fifth Amendment.

The *Miranda* Court repeatedly and unequivocally stated throughout its opinion that its decision was based in the Constitution itself. The first paragraph of the opinion established this fundamental point:

> The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

384 U.S. at 439. Later in the opinion, the Court reiterated that the "constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant

questioned while in custody or otherwise deprived of his freedom of action in any significant way." Id. at 445. The holding of the Court was also described as unmistakably based on a constitutional violation. The confessions at issue were held inadmissible because each was obtained "under circumstances that did not meet constitutional standards for protection of the privilege." Id. at 491.

Although the *Miranda* Court invited Congress and the states to develop other effective ways to protect the constitutional rights of individuals subjected to custodial interrogation, it emphasized that "unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed." 384 U.S. at 467. This language clearly did not leave Congress free to eliminate the requisite warnings through legislation designed to overturn the decision. Indeed, the Court emphasized that "the issues presented are of constitutional dimension and must be determined by the courts. . . . Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." Id. at 490-91.

An examination of the Supreme Court's jurisprudence since *Miranda* further demonstrates that *Miranda* cannot properly be viewed as merely an exercise of the Court's supervisory powers. Perhaps the most important indication that the Court does not regard *Miranda* as resting simply on its supervisory powers is the fact that the Court has continued to apply the *Miranda* rules to cases arising in state courts. See, e.g., Stansbury v. California, 511 U.S. 318 (1994); Minnick v. Mississippi, 498 U.S. 146 (1990); Arizona v. Roberson, 486 U.S. 675 (1988). In fact, three of the four consolidated cases which comprise *Miranda* arose in state courts. Although the Court has the authority to announce rules of procedure and evidence binding on federal courts, it has

consistently disclaimed any such supervisory authority over the state courts. With respect to cases tried before state tribunals, the Court's "authority is limited to enforcing the commands of the United States Constitution." Mu'Min v. Virginia, 500 U.S. 415, 422 (1991). The federal judiciary "may not require the observance of any special procedures" in state courts "except when necessary to assure compliance with the dictates of the Federal Constitution." Harris v. Rivera, 454 U.S. 339, 344-45 (1981). As such, the Supreme Court's continued application of *Miranda's* exclusionary rule in state cases leads to the inescapable conclusion that *Miranda* rests on constitutional underpinnings.[3]

Finally, the Supreme Court has held that claims that a conviction rests on statements obtained in violation of *Miranda* are cognizable on federal habeas review. Withrow v. Williams, 507 U.S. 680, 690-95 (1993). Habeas review is only available for claims that a person "is in custody in violation of the Constitution or the laws or treaties of the United States." 28 U.S.C. § 2254(a). *Miranda* certainly does not involve laws or treaties. Thus, the Court's holding in *Withrow* depends on the conclusion that the requirements of *Miranda* arise from and protect constitutional rights.

In attempting to prevent *Withrow* from extending federal habeas review, the government argued that since the *Miranda* rules "are not constitutional in character, but merely

[3] Michigan v. Tucker, 417 U.S. 433 (1974), and Oregon v. Elstad, 470 U.S. 298 (1985), both cases relied upon by the Fourth Circuit to support its conclusion that *Miranda* is not a constitutionally based decision, arose in state courts. Although both decisions narrowed the scope of *Miranda's* exclusionary rule (Tucker by declining to apply the holding retroactively to statements obtained prior to the *Miranda* decision; Elstad by declining to suppress a properly obtained confession after earlier statements were obtained in violation of *Miranda*), both decisions reaffirmed *Miranda's* basic conclusion that unwarned statements must be excluded from the government's case-in-chief. Tucker, 417 U.S. at 445; Elstad, 479 U.S. at 307.

'prophylactic,'" federal habeas review should not extend to claims based on violations of these rules. Withrow, 507 U.S. 690. The Court declined to reach this conclusion. Although Justice Souter, writing for the majority, did not deny that "we have sometimes called the *Miranda* safeguards 'prophylactic' in nature," he concluded that "[p]rophylactic though it may be, in protecting a defendant's Fifth Amendment privilege against self-incrimination, *Miranda* safeguards 'a fundamental trial right." 507 U.S. at 691. The Court went on to state that *Miranda* "brace[s] against 'the possibility of unreliable statements in every instance of in-custody interrogation,'" and thereby "serves to guard against 'the use of unreliable statements at trial." 507 U.S. at 692.

Miranda is hardly the sole example of a constitutionally based decision which contains a bright-line rule. For example, in North Carolina v. Pearce, 395 U.S. 711 (1969), the Court held that a "presumption of vindictiveness" would arise whenever a judge imposed a more sever sentence after a defendant had successfully overturned his original conviction on appeal. In such circumstances, the reason for the harsher sentence "must affirmatively appear [and] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Pearce, 395 U.S. at 726. Absent such a showing, vindictiveness against the defendant was to be presumed and the sentence he received on retrial struck down as a violation of due process.

Likewise, in Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that when a suspect effectively asserts his right to a lawyer (as opposed to his right to remain silent), the suspect may not be subjected to further police questioning until counsel has been made available to him unless he himself initiates further conversation with the police. *Edwards* held, in effect,

that when a custodial suspect invokes his right to counsel, there is a conclusive presumption that any subsequent waiver of rights that comes at police instigation is compelled. In essence, *Edwards* created a new, constitutionally mandated rule to protect a suspect's Sixth Amendment rights which built on and reinforced the rules of *Miranda*.[4]

The inescapable conclusion from the Supreme Court's most recent jurisprudence is that it would be unconstitutional to apply § 3501 to admit a defendant's statement in a case such as this where *Miranda* would require its suppression. Although described at times as "prophylactic," the requirements announced in *Miranda* cannot be explained as anything other than "necessary to assure compliance with the dictates of the Federal Constitution." Harris v. Rivera, 454 U.S. 339, 344-45 (1981). As such, it is a rule that Congress cannot supersede by legislation. See City of Boerne v. Flores, 117 S.Ct. 2157, 2163-2164 (1997).[5]

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[4] See Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist*, The Tulsa Law Journal, Vol. 34, pp. 471-475 (1999).

[5] Should the Court deny this petition and thereby affirm the Fourth's Circuit's decision that 18 U.S.C. § 3501 rather than *Miranda* now governs the admissibility of inculpatory statements, the petitioner would ask that the matter be remanded for further proceedings in the district court to determine whether the voluntariness standard of § 3501 was met in this case. The Fourth Circuit concluded that such action was unnecessary because the district court found that the statements, though obtained in violation of *Miranda*, were otherwise voluntary. The Fourth Circuit relied on a footnote in the district court's decision denying reconsideration to support this conclusion. See United States v. Dickerson, 971 F. Supp. 1023, n. 1 (E.D.Va. 1997). The footnote in question served to deny a motion in which Mr. Dickerson argued that his arrest was not supported by probable cause and that any evidence, including all statements by James Rochester, should be suppressed as "fruits of the poisonous tree." The district court misconstrued this Fourth Amendment argument as grounded in the Fifth Amendment and applied United States v. Elie, 111 F.3d 1135 (4th Cir. 1997), to deny applicability of the poisonous tree doctrine. Neither the district court nor Mr. Dickerson ever addressed the standards set forth in § 3501 because it was not recognized as controlling. If this Court affirms the substantial change in Fifth Amendment law at issue herein, the petitioner should be given a full opportunity to argue his case in light of these changes.

II. The Court of Appeals erred in considering the applicability of 18 U.S.C. § 3501 because the issue was not properly raised and preserved by the government.

As discussed above, if this Court addresses validity of § 3501, it must declare it unconstitutional. However, due to this case's unusual procedural posture, the Court should decline to reach the constitutional issue. Instead, the Court should rule that the Fourth Circuit erred in reaching *sua sponte* the applicability of 18 U.S.C. § 3501 when the government never raised or preserved the issue. By failing to raise the issue, the government waived it. In light of this waiver, the Court of Appeals, in deciding whether to raise the issue *sua sponte* should have determined whether the district court committed plain error in failing to consider the effect of § 3501 on the admissibility of Mr. Dickerson's statements. This the Fourth Circuit failed to do. Instead, the appellate court opined:

> Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it. Here, the district court's suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. Thus, the question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today.

United States v. Dickerson, 166 F. 3d 672 (4th Cir. 1999).

Any review by an appellate court of an error that has not been properly preserved for review must be solely for plain error pursuant to Fed. R. Crim. P. 52(b). See United States v. Olano, 507 U.S. 725, 731 (1993); United States v. David, 83 F.3d 638, 641 (4th Cir. 1996); United States v. Leong, No. 96-4876 (4th Cir. Sept. 19, 1997) (unpublished). Rule 52(b) requires that three elements be met before an appellate court may notice an error not preserved for review: The alleged defect "must, in fact, be error; the error must be plain; and it must affect. . .

substantial rights." Olano, 507 U.S. at 731-32; United States v. Cedelle, 89 F.3d 181, 184 (4th Cir. 1996). Even if these elements are satisfied, an unpreserved error should not be noticed unless failure to do so would "seriously affect[] the fairness, integrity or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. ___, 117 S.Ct. 1544, 1550 (1997); Cedelle, 89 F.3d at 184.

In the present case, the unpreserved "error" does not satisfy the criteria of Rule 52(b). Assuming *arguendo* that there was "error" and that this error "affected substantial rights," irrefutably the error was not "plain." To be "plain," an error must be "clear" or "obvious." Olano, 507 U.S. at 734. That statements obtained in violation of the clear requirements of *Miranda* might otherwise be admissible under § 3501 is anything but clear or obvious. No authority controlling this question had been set forth by this Court at the time the district court decided the motion to suppress, nor had any firm rule emerged in the other courts of appeals. See Leong, Slip opinion at 4-6. As the trial court did not commit plain error in failing to examine the effect of § 3501 on the admissibility of the defendant's statements, this Court should reverse the Fourth Circuit for its erroneous decision to raise the question *sua sponte*. See David, 83 F.3d at 642 (explaining that when "an error is unclear both at the time of the trial and at the time of appeal" it is not plain and review is barred).

No party with standing requested that the appellate court consider the effect of § 3501. Therefore, no case or controversy was ever properly raised concerning the statute's constitutionality. As noted by Justice Brandeis over sixty years ago, prudential considerations, as well as long-established judicial practice, demand that a court "refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our

judicial function, when the question is raised by a party whose interests entitle him to raise it." Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 341 (Brandeis, J., concurring). Even Justice Scalia in Davis v. United States, 512 U.S. 452 (1994), cited by the Fourth Circuit to support its decision to address the question *sua sponte*, recognized the impropriety of invoking § 3501 at such a late stage in the proceedings: "I agree with the Court that it is proper, given the Government's failure to raise the point, to render judgment without taking account of § 3501." Davis, 512 at 464.[6] No party with standing has sought a ruling on the legality and effect of § 3501 in this case. Accordingly, this Court should reverse the Fourth Circuit and refrain from unnecessarily deciding such an important issue here.

For all the reasons discussed above, this Court should reverse the Fourth Circuit and decline to address the substantive effect of § 3501 in this case. The district court's failure to consider the statute did not constitute plain error, and no case or controversy has been presented because no party has sought a ruling regarding the applicability of § 3501 in this case.

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[6] As justification for addressing this issue *sua sponte*, the panel referred to Justice Scalia's concurring opinion in Davis, 512 U.S. at 465, wherein he noted that the government's failure to invoke § 3501 "may have produced – during an era of intense national concern about the problem of run-away crime – the acquittal and the nonprosecution of many dangerous felons." The Fourth Circuit then stated that this "was just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted." Dickerson, 166 F. 3d at . This misstates the record in this case. Mr. Dickerson never admitted to knowingly participating in any bank robberies. He only stated that he was aware James Rochester had robbed banks. He denied acting as a lookout or as a getaway driver.

III. Evidence obtained during a search of the Appellee's home should remain suppressed.

A. The search was authorized by a facially deficient warrant which failed to state with particularity the items to be seized.

The warrant requirement of the Fourth Amendment demands particularity. It prohibits the use of general warrants. Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980); Andersen v. Maryland, 427 U.S. 463, 96 S.CT. 2737 (1976). The warrant requirement "makes general searches. . . impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 48 S.Ct. 74 (1927).

The warrant approved by the magistrate judge to search Mr. Dickerson's home was drafted in the most general of terms. It authorized an intrusion into a private home for "evidence of the crime of bank robbery." Even if circumstances only permit a generic description of the items to be seized, "the Fourth Amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and 'warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized.'" United States v. Robertson, 21 F.3d 1030, 1033 (10th Cir. 1994), cert. denied, 513 U.S. 891, 115 S.Ct. 238 (1994)(citations omitted).

In the present case, Agent Lawlor, at a minimum, could have specified for the magistrate judge the amount of money taken during the bank robbery, the denominations and the serial numbers of the currency taken, the descriptions of the robber's clothing, and the descriptions of the gun and backpack used in the robbery. As Robertson notes, generic warrants such as this

which do not contain any of the identifying characteristics known to the government violate the particularity requirement of the Fourth Amendment.

The language in the warrant at issue here lacks any limitation whatsoever on the kind of evidence sought because the investigating officers had no idea what might be found. As Judge Michael correctly noted in dissenting to this portion of the Fourth Circuit's majority opinion, "'evidence of the crime of bank robbery' is far too general. That description does nothing to confine the discretion of an executing officer. . . .Under this interpretation, virtually no piece of paper or property would be beyond the bounds of a search." Dickerson, 166 F.3d at 698.

The fact that the officers executing the warrant used appropriate discretion while searching does not validate an otherwise insufficient warrant. It is precisely this type of on the scene police discretion that the particularity requirement of the Fourth Amendment prohibits. This same use of on the scene police discretion was addressed in United States v. Buck:

> While it can safely be said that the police here performed reasonably under the circumstances. . . they clearly did not insure that all the known facts were included in the warrant. The warrant only described the crimes -- and gave no limitation whatsoever on the kind of evidence sought. In short, "the warrant left it entirely to the discretion of the officials conducting the search to decide what items were to be seized, and thus was not permissible under the Fourth Amendment.

813 F.2d 588, 589 (2nd Cir. 1987).

B. The "good faith" exception to the warrant requirement is not applicable in the present case because the magistrate judge was misled and the warrant was so facially deficient that the executing officers could not have reasonably presumed it valid.

Pursuant to the "good-faith" exception adopted in United States v. Leon, 463 U.S. 981 (1983), evidence obtained by law enforcement officers acting in reasonable reliance on a search

warrant issued by a detached and neutral magistrate but ultimately found to be invalid can still be used in the prosecution's case-in-chief. Even under this broad exception, however, suppression is still appropriate under certain situations in which an officer's reliance on a warrant could not be deemed reasonable. An "officer's reliance on the magistrate's probable cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was not properly issued." Leon, 468 U.S. at 922.

Leon outlined four situations in which an officer's reliance on a search warrant would not be reasonable:

> (1) the magistrate was misled by information in an affidavit that the officer knew was false or would have known was false except for the officer's reckless disregard of the truth;
>
> (2) the magistrate wholly abandoned his detached and neutral judicial role;
>
> (3) the warrant was based on an affidavit that was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and
>
> (4) the warrant was facially deficient, by failing to particularize the place to be searched or the things to be seized, that the executing officers could not reasonably presume it to be valid.

468 U.S. at 923. Under *Leon*, the proper test of an officer's good faith is "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." Leon, 468 U.S. at 922, n. 23.

In this case, Agent Lawlor told the magistrate judge that an expedited telephonic warrant was necessary because Mr. Dickerson was not under arrest and might return to his home and destroy evidence. The credibility of this assertion is questionable because Agent Lawlor did not

know any evidence was in the home to be destroyed. He had been in Mr. Dickerson's home earlier in the evening and had not seen any evidence relating to the bank robbery investigation. More importantly, Agent Lawlor's statement that Mr. Dickerson was not under arrest was misleading. As the district court found, the assertion that Mr. Dickerson was free to leave was incredible.

Agent Lawlor improperly led the magistrate judge to believe that exigencies existed which necessitated an immediate, telephonic response to his application. He also failed to fully share with the magistrate his knowledge concerning what items might be seized during the search. When questioned at the suppression hearing about the language in the warrant authorizing a search for "evidence of the crime of bank robbery," Agent Lawlor attempted to attribute this to the magistrate judge despite that the fact that nothing in the transcript of the telephonic application to the magistrate supports this testimony.

Agent Lawlor's conduct leads to an inevitable conclusion: he misled the magistrate judge with information that he knew was false or would have known was false except for his reckless disregard of the truth. Given this, any subsequent reliance on the search warrant by other officers was unreasonable rendering the good-faith exception inapplicable.

Even if Agent Lawlor's conduct did not constitute an intentional or reckless disregard for the truth, the good-faith exception is still inapplicable because the warrant was so facially deficient, by failing to particularize the things to be seized, that the executing officers could not reasonably have presumed it valid. As discussed above, the search warrant failed to state with any particularity what items were to be seized. An objectively reasonable officer certainly would have

realized this deficiency. To argue to the contrary is to argue that a reasonable officer is one with no understanding of the Fourth Amendment's particularity requirement.[7]

CONCLUSION

Based on the foregoing, the petitioner respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari and review the merits of the Fourth Circuit Court of Appeal's decision reversing the district court's suppression of evidence.

Respectfully submitted,

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[7] In applying the good-faith exception to the exclusionary rule, the Fourth Circuit improperly relied on the affidavit of Agent Wenko to conclude that the searching officer had sufficient knowledge to properly tailor his search. Dickerson, 166 F.3d at 695. This information, however, was never properly presented by the government. As the Fourth Circuit held, this evidence was not offered to the district in a timely manner, and the district court did not abuse its discretion in failing to consider it. Id., 166 F.3d at 680. As such, it should not be relied upon to assert the good-faith exception.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari was served by first class mail, postage prepaid, this 30th day of July, 1999, to:

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on July 30, 1999.

James W. Hundley

166 F.3d 667

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

CHARLES THOMAS DICKERSON, Defendant-Appellee.

WASHINGTON LEGAL FOUNDATION; SAFE STREETS COALITION, Amici Curiae.

No. 97-4750

Argued: January 30, 1998
Decided: February 8, 1999

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (CR-97-159-A)

Before WILLIAMS and MICHAEL, Circuit Judges, and KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Williams wrote the opinion, in which Senior Judge Kiser joined. Judge Michael wrote an opinion concurring in part and dissenting in part.

COUNSEL

ARGUED: Vincent L. Gambale, Assistant United States Attorney, Alexandria, Virginia, for Appellant. Paul George Cassell, College of [Page 2] Law, UNIVERSITY OF UTAH, Salt Lake City, Utah, for Amici Curiae. James Warren Hundley, BRIGLIA & HUNDLEY, Fairfax, Virginia, for Appellee. ON BRIEF: Helen F. Fahey, United States Attorney, William G. Otis, Senior Litigation Counsel, Justin W. Williams, Assistant United States Attorney/Chief, Criminal Division, Robert A. Spencer, Assistant United States Attorney, Alexandria, Virginia, for Appellant. Daniel J. Popeo, Paul D. Kamenar, WASHINGTON LEGAL FOUNDATION, Washington, D.C., for Amici Curiae.

OPINION

WILLIAMS, Circuit Judge:

In response to the Supreme Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), the Congress of the United States enacted 18 U.S.C.A. § 3501 (West 1985), with the clear intent of restoring voluntariness as the test for admitting confessions in federal court. Although duly enacted by the United States Congress and signed into law by the President of the United States, the United States Department of Justice has steadfastly refused to enforce the provision. In fact, after initially "taking the Fifth" on the statute's constitutionality, the Department of Justice has now asserted, without explanation, that the provision is unconstitutional. With the issue squarely presented, we hold that Congress, pursuant to its power to establish the rules of evidence and procedure in the federal courts, acted well within its authority in enacting § 3501. As a consequence, § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court. Accordingly, the district court erred in suppressing Dickerson's voluntary confession on the grounds that it was obtained in technical violation of *Miranda*.

I.

On January 27, 1997, Charles T. Dickerson confessed to robbing a series of banks in Maryland and Virginia. Dickerson was subsequently indicted by a federal grand jury on one count of conspiracy to commit bank robbery in violation of 18 U.S.C.A. § 371 (West Supp. 1998), three counts of bank robbery in violation of 18 U.S.C.A. [Page 3] § 2113(a) & (d) (West Supp. 1998), and three counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C.A. § 924(c) (1) (West Supp. 1998). Shortly thereafter, Dickerson moved to suppress his confession. Although the district court specifically found that Dickerson's confession was voluntary for purposes of the Fifth Amendment, it nevertheless suppressed the confession because it was obtained in technical violation of *Miranda*. /1

In ruling on the admissibility of Dickerson's confession, the district court failed to consider § 3501, which provides, in pertinent part, that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C.A. § 3501(a). Based upon the statutory language, it is evident that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court. Thus, if Congress possessed the authority to enact § 3501, Dickerson's voluntary confession is admissible as substantive evidence in the Government's case-in-chief.

Congress enacted § 3501 as a part of the Omnibus Crime Control Act of 1968, just two years after the Supreme Court decided *Miranda*. Although the Supreme Court has referred to § 3501 as "the statute governing the admissibility of confessions in federal prosecutions," *United States v. Alvarez-Sanchez*, 511 U.S. 350, 351 (1994), the Court has never considered whether the statute overruled *Miranda*, *see Davis v. United States*, 512 U.S. 452, 457 n.* (1994). Indeed, although several lower courts have found that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, *see United States v. Crocker*, 510 F.2d 1129, 1137 (10th Cir. 1975); *United States v. Rivas-Lopez*, 988 F. Supp. 1424, 1430-36 (D. Utah 1997), no Administration since the provision's enactment has pressed the point, *see Davis*, 512 U.S. at 463-64 (Scalia, J., concurring) (noting [Page 4] that "the provision has been studiously avoided by every Administration . . . since its enactment more than 25 years ago"); *see also* U.S. Dep't of Justice, Report to Attorney General on Law of Pre-Trial Interrogation 72-73 (1986) (discussing "[t]he abortive implementation of § 3501" after its passage in 1968). In fact, after initially declining to take a position on the applicability of § 3501, *see Davis*, 512 U.S. at 457 n.*, the current Administration has now asserted, without explanation, that the provision is unconstitutional, *see* Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997).

Recently, Justice Scalia expressed his concern with the Department of Justice's failure to enforce § 3501. *See Davis*, 512 U.S. at 465 (Scalia, J., concurring). In addition to "caus[ing] the federal judiciary to confront a host of *Miranda* ' issues that might be entirely irrelevant under federal law," *id.*, Justice Scalia noted that the Department of Justice's failure to invoke the provision "may have produced - during an era of intense national concern about the problem of run-away crime - the acquittal and the nonprosecution of many dangerous felons," *id.* This is just such a case. Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's Office from arguing that Dickerson's confession is admissible under the mandate of § 3501.

Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it. *See United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-48 (1993). Here, the district court has suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. Thus, the question of whether § 3501 governs the admissibility of confessions in federal court is squarely before us today.

Determining whether Congress possesses the authority to enact § 3501 is relatively straightforward. Congress has the power to overrule judicially created rules of evidence and procedure that are not required by the Constitution. *See Carlisle v. United States,* 517 U.S. 416, [Page 5] 426 (1996); *Palermo v. United States,* 360 U.S. 343, 345-48 (1959). Thus, whether Congress has the authority to enact § 3501 turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. Clearly it is not. At no point did the Supreme Court in *Miranda* refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, 384 U.S. at 467, disclaimed any intent to create a "constitutional straightjacket," *id.,* referred to the warnings as "procedural safeguards," *id.* at 444, and invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490. Since deciding *Miranda,* the Supreme Court has consistently referred to the *Miranda* warnings as "prophylactic," *New York v. Quarles,* 467 U.S. 649, 654 (1984), and "not themselves rights protected by the Constitution," *Michigan v. Tucker,* 417 U.S. 433, 444 (1974). We have little difficulty concluding, therefore, that § 3501, enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts, is constitutional. As a consequence, we hold that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda.*

II.

Because of the unique posture of this case, *i.e.,* an interlocutory appeal from the denial of a motion to reopen a suppression hearing, and the significant legal questions raised therein, we have set forth the factual background and the procedural history in painstaking detail. Although rather lengthy, we believe that it is helpful in understanding the important legal issues that must be addressed.

On January 24, 1997, an individual using a silver semi-automatic handgun and carrying a black leather bag robbed the First Virginia Bank in Old Town, Alexandria, Virginia, of approximately $876. An eyewitness saw the robber exit the bank, run down the street, and get into a white Oldsmobile Ciera with District of Columbia license plate number D5286. Within seconds, the robber exited the car, placed something in the trunk, and then re-entered the car on the passenger side. The car then drove away.

The subsequent investigation into the bank robbery revealed that the getaway car was registered to Charles T. Dickerson of Takoma [Page 6] Park, Maryland. On January 27, 1997, approximately ten FBI agents and an Alexandria police detective (the agents) traveled to Dickerson's Takoma Park address. Upon arrival, the agents noticed a white Oldsmobile Ciera with D.C. license plate number D5286 parked on the street in front of Dickerson's apartment. Special Agent Christopher Lawlor knocked on Dickerson's door and identified himself. After some delay, Dickerson opened the door. Special Agent Lawlor informed Dickerson that the agents were investigating a bank robbery.

Although the parties dispute whether the agents had consent to enter Dickerson's apartment, there is no dispute that several agents did, in fact, do so. After a short conversation, Special Agent Lawlor asked Dickerson if he would accompany them to the FBI Field Office in Washington, D.C. Dickerson agreed, /2 but requested that he be allowed to retrieve his coat from his bedroom. As Dickerson picked up his coat, Special Agent Lawlor noticed a large amount of cash on the bed. After placing the money in his coat pocket, Dickerson told the agents that it was gambling proceeds from Atlantic City. After denying the agents' request to search his apartment, Dickerson rode with the agents to the FBI Field Office. Dickerson was not formally placed under arrest and was not handcuffed. Several agents, including Agent Lawrence Wenko, remained in the vicinity of Dickerson's apartment.

At the FBI Field Office, Dickerson was interviewed by Special Agent Lawlor and Detective Thomas Durkin of the Alexandria Police Department. Dickerson denied any involvement in the robbery, but admitted that he had driven to Old Town on the morning in question to look at a restaurant. While in the vicinity of the First Virginia Bank, Dickerson claims that he ran into an old friend named Terrance, who asked for a ride to Suitland, Maryland. Dickerson agreed, and drove Terrance to Suitland, where he dropped Terrance off near a liquor store.

Special Agent Lawlor left the interview room and called United States Magistrate Judge James E. Kenkel to obtain a warrant to search Dickerson's apartment. Based upon the tape-recorded conversation [Page 7] between Special Agent Lawlor and Judge Kenkel, it is undisputed that Special Agent Lawlor described the circumstances of the robbery, including that the robber used a handgun, carried a bag, requested unmarked bills, and left the scene in a car registered to Dickerson. In addition, Special Agent Lawlor noted that Dickerson had over $550 in cash when picked up, had just that day paid his landlord $1350 to cover back rent, and had admitted that he was near the bank at the time of the robbery. Finally, Special Agent Lawlor explained that he was seeking a telephonic warrant because Dickerson was not under arrest and could easily go home and destroy any evidence of the bank robbery.

Based upon Special Agent Lawlor's sworn statement, Judge Kenkel stated that he was convinced "that there is probable cause to believe at that residence there may be . . . evidence of . . . the bank robbery in question." (J.A. at 69.) In the section of the warrant used to identify the property to be seized, Special Agent Lawlor wrote: "Evidence of the crime of bank robbery." (J.A. at 66.) In the section of the warrant used to identify the time issued, Special Agent Lawlor wrote: "8:50 p.m." /3 (J.A. at 66.) Special Agent Lawlor then called Agent Wenko, who had remained in the vicinity of Dickerson's apartment, to inform him that a warrant had been issued authorizing the agents to search Dickerson's apartment for evidence of the First Virginia Bank robbery. Immediately after being notified about the warrant, Agent Wenko and a team of agents proceeded to search Dickerson's apartment.

After returning to the interview room, Special Agent Lawlor told Dickerson that agents were about to search his apartment. At some point thereafter, Dickerson informed Special Agent Lawlor and Detective Durkin that he wished to make a statement. In his statement, Dickerson admitted to being the getaway driver in a series of bank robberies. Dickerson then identified Jimmy Rochester as the actual bank robber. Of particular importance to this case, Dickerson [Page 8] told the agents that on January 24, 1997, the pair drove to Old Town, Alexandria. Dickerson admitted that he stopped the car near the First Virginia Bank, that Rochester got out of the car, that Rochester returned a short while later and placed something in the trunk, that Rochester got back in the car, and that the pair drove away. Dickerson also told the agents that Rochester gave him a silver handgun /4 and some dye-stained money that Rochester feared the police might find in his apartment. Following these statements, Dickerson was placed under arrest.

As a result of Dickerson's confession, Rochester was apprehended by the police and placed under arrest. At that time, Rochester admitted to robbing eleven banks in Georgia, three banks in Virginia (including the First Virginia Bank in Old Town, Alexandria), four banks in Maryland, and an armored car in Maryland. Of particular importance here, Rochester stated that Dickerson was his getaway driver in each of the Maryland and Virginia bank robberies.

The search of Dickerson's apartment produced a silver .45 caliber handgun, dye-stained money, a bait bill from another robbery, ammunition, masks, and latex gloves. The agents also found a small quantity of drugs in plain view. A subsequent warrant-authorized search of Dickerson's Oldsmobile Ciera produced a black leather bag and solvent used to clean dye-stained money.

Based upon his confession, Rochester's statements, and the aforementioned physical evidence discovered during the searches of his apartment and car, Dickerson was indicted by a federal grand jury on one count of conspiracy to commit bank robbery in violation of 18 U.S.C.A. § 371 (West Supp. 1998), on three counts of bank robbery in violation of 18 U.S.C.A. § 2113(a) and (d) (West Supp. 1998), and on three counts of using a firearm during and in relation to a crime of violence in violation of 18 U.S.C.A. § 924(c) (1) (West Supp. 1998). [Page 9]

On May 19, 1997, Dickerson filed a motion to suppress (1) the statements he made at the FBI Field Office; (2) the evidence found as a result of his statements; (3) the physical evidence obtained during the search of his apartment; and (4) the physical evidence obtained during the search of his car. The Government submitted a brief in opposition to the motion to suppress. Several days later, the Government supplemented its brief in opposition. A hearing on the motion to suppress was held in the United States District Court for

the Eastern District of Virginia on May 30, 1997.

At the suppression hearing, the Government relied exclusively upon the testimony of Special Agent Lawlor. Among other things, Special Agent Lawlor testified that Dickerson was read (and waived) his rights under *Miranda* prior to his confession. Of particular importance here, Special Agent Lawlor testified that Dickerson confessed "shortly after" he obtained the warrant to search Dickerson's apartment. In contrast, Dickerson testified that he confessed prior to being read (and waiving) his *Miranda* rights and about thirty minutes after being informed about the warrant to search his apartment. The advice-of-rights form indicates that Dickerson waived his *Miranda* rights at 9:41 p.m. (J.A. at 72.) After the hearing, the district court asked the parties to submit supplemental briefs in support of their respective positions. The Government filed a supplemental memorandum on June 3, 1997.

On July 1, 1997, the district court issued an Order and Memorandum Opinion. The district court, among other things, suppressed Dickerson's statement implicating himself and Rochester in the First Virginia Bank robbery, finding that it was made while he was in police custody, /5 in response to police interrogation, and without the necessary *Miranda* warnings. In so holding, the district court found that Dickerson's in-court testimony was more credible than that of Special Agent Lawlor. This finding rested, in part, upon the fact that Special Agent Lawlor's testimony - that he read Dickerson his *Miranda* warnings "shortly after" obtaining the warrant - was contradicted by the warrant (issued at "8:50 p.m.") and the advice-of-rights [Page 10] form (executed at "9:41 p.m."). Because the documentary evidence undermined Special Agent Lawlor's credibility /6 (and supported [Page 11] Dickerson's testimony, *i.e.*, he was read his *Miranda* rights about thirty minutes after being told about the warrant), the district court found that "Dickerson was not advised of his *Miranda* rights until after he had completed his statement to the government." (J.A. at 98.)

Although the district court suppressed the statement obtained in violation of *Miranda*, it nevertheless denied Dickerson's motion to suppress the evidence found as a result thereof, *e.g.*, the statement made by Rochester identifying Dickerson as the getaway driver. The district court, relying upon this Court's decision in *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997), noted that evidence found as a result of a statement made in violation of *Miranda* may only be suppressed if the statement was involuntary within the meaning of the Due Process Clause of the Fifth Amendment. Because Dickerson's statement was voluntary under the Fifth Amendment, the district court concluded that the evidence found as a result thereof was admissible at trial.

The district court did, however, suppress the physical evidence discovered during the search of Dickerson's apartment on January 27, 1997. The district court concluded that the warrant was insufficiently particular in describing the items to be seized. Moreover, the district court concluded that the good-faith exception to the exclusionary rule was inapplicable because the agents "[e]xecuting the [w]arrant [a]cted in [b]ad [f]aith" by relying upon a warrant that was so facially deficient. (J.A. at 91.) [Page 12]

Finally, the district court denied Dickerson's motion to suppress the evidence discovered in the trunk of his car. The district court found that the warrant to search Dickerson's car, unlike the warrant to search his apartment, was sufficiently particular in describing the items to be seized. /7 Moreover, the district court found that the search of the car was supported by the eyewitness accounts of the bank robbery.

On July 15, 1997, the Government filed a motion asking the district court to reconsider its Order suppressing the statements made by Dickerson at the FBI Field Office and the physical evidence found during the search of Dickerson's apartment. The Government's motion included affidavits from Detective Durkin and Agent Wenko, and a statement written by Dickerson while at the FBI Field Office. In addition, the Government argued that because Dickerson's statements were voluntary, they were nonetheless admissible under the mandate of 18 U.S.C.A. § 3501 (West 1985).

Detective Durkin, who was in the interview room with Dickerson at all times, stated in his affidavit that "Dickerson was read his [Page 13] *Miranda* rights before he made th[e] statements" implicating himself and Rochester in the First Virginia Bank robbery. (J.A. at 121.) Detective Durkin explained that after Special

Agent Lawlor returned to the interview room to announce that they were going to search Dickerson's apartment, Special Agent Lawlor immediately departed. According to Detective Durkin, it was not until Special Agent Lawlor returned some time later that they read Dickerson his *Miranda* warnings. In fact, Detective Durkin testified that when Dickerson was read his *Miranda* rights he still denied any involvement in the bank robbery. According to Detective Durkin, it was not until Dickerson was told that agents had found a bait bill from a bank robbery in his apartment that he decided to confess.

Attached to Detective Durkin's affidavit was a hand-written statement that Dickerson made while at the FBI Field Office in which he stated that he "was read [his] rights at 7:30 [p.m.]" /8 (J.A. at 123.) In addition, Dickerson wrote in the statement that he knew "nothing [about] the bank robbery" in question. (J.A. at 123.) Thus, according to his own hand-written note, Dickerson was read his *Miranda* warnings prior to implicating himself and Rochester in the First Virginia Bank robbery. /9 [Page 14]

Finally, Agent Wenko's affidavit contradicted, among other things, the district court's finding that the agents who executed the search of Dickerson's apartment acted in bad faith. Agent Wenko, who was the lead agent during the search of Dickerson's apartment, stated that he was familiar with the specifics of the bank robbery in question and knew what specific evidence to look for. In addition, Agent Wenko stated that he had been investigating bank robberies for seven years and was very familiar with the type of evidence customarily associated with bank robberies, *e.g.*, guns, money, bait bills, dye-stained money and clothes, disguises, carrying bags, and gloves.

On August 4, 1997, the district court denied the Government's motion for reconsideration. *See United States v. Dickerson*, 971 F. Supp. 1023 (E.D. Va. 1997). Noting that no provision in the Federal Rules of Criminal Procedure governed motions for reconsideration, the district court used the standard set forth in Rule 59(e) of the Federal Rules of Civil Procedure as its guide. *See id.* at 1024. In so doing, the district court rejected the Government's motion for reconsideration upon the ground that the Government failed to establish that "the evidence . . . was unavailable at the time of the hearing." *Id.* This interlocutory appeal followed.

III.

Before determining whether Congress possesses the authority to enact § 3501, we must first consider whether the district court erred in refusing to entertain the Government's motion for reconsideration. /10 (Text continued on page 16) [Page 15] [Page 16]

Although a case of first impression in this Court, our sister circuits review a district court's refusal to reopen a suppression hearing for abuse of discretion. *See, e.g., United States v. Hassan*, 83 F.3d 693, 696 (5th Cir. 1996); *United States v. Roberts*, 978 F.2d 17, 20 (1st Cir. 1992); *United States v. Buffington*, 815 F.2d 1292, 1298 (9th Cir. 1987). We adopt that standard here.

Under an abuse of discretion standard, a reviewing court may not substitute its judgment for that of the district court. *See, e.g., United States v. Mason*, 52 F.3d 1286, 1289 (4th Cir. 1995). Indeed, an appeals court may uphold the exercise of a district court's discretion even where it might have ruled differently on the matter in the first instance. Instead, our task is simply to determine whether the district court's exercise of discretion was arbitrary or capricious in light of the governing law and the facts. *See, e.g., id.*

In its motion for reconsideration, the U.S. Attorney's Office asked the district court to reverse its suppression rulings on two grounds. First, the Government presented the district court with additional evidence that corroborated Special Agent Lawlor's testimony concerning when Dickerson was read his *Miranda* warnings. Second, the Government argued that even if Dickerson's confession was elicited in technical violation of *Miranda*, it was nevertheless admissible under 18 U.S.C.A. § 3501 (West 1985). We address each ground in turn.

A.

Relying upon Rule 59(e) of the Federal Rules of Civil Procedure, the district court rejected the Government's motion for reconsideration [Page 17] because the Government failed to establish that "the evidence . . . was unavailable at the time of the hearing." *United States v. Dickerson*, 971 F. Supp. 1023, 1024 (E.D. Va. 1997). The Government actually conceded, as it does on appeal, that the evidence forming the basis for its motion was available at the time of the suppression hearing. The Government explains, however, that the evidence was not introduced because (1) it never believed that the district court would find Dickerson more believable than Special Agent Lawlor; and (2) it did not want to burden the district court with cumulative evidence.

As an initial matter, although Rule 59(e) of the Federal Rules of Civil Procedure requires a showing that the evidence supporting a motion for reconsideration was not available at the time of the initial hearing, *see Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993), the Federal Rules of Civil Procedure are not binding in criminal proceedings. As a result, that evidence was available to the movant prior to the suppression hearing does not, as a matter of law, defeat a motion for reconsideration in a criminal case. *See, e.g., United States v. Regilio*, 669 F.2d 1169, 1177 (7th Cir. 1981) (recognizing that "society's interest in admitting all relevant evidence militates strongly in favor of permitting reconsideration").

We also recognize, however, that the district court has a strong interest in controlling its docket and avoiding piecemeal litigation. Thus, when the evidence forming the basis for a party's motion for reconsideration was in the movant's possession at the time of the initial hearing, as was the case here, the movant must provide a legitimate reason for failing to introduce that evidence prior to the district court's ruling on the motion to suppress before we will determine that a district court abused its discretion in refusing to reconsider its suppression ruling. /11 [Page 18]

Before considering the Government's reasons for failing to introduce the evidence in question, however, we note that it was given numerous opportunities to introduce the evidence prior to the district court's ruling on the suppression motion. Dickerson's motion to suppress was filed on May 19, 1997. On May 23, 1997, the Government filed a response to Dickerson's motion to suppress. Four days later, the Government supplemented its response. A hearing on the motion was held on May 30, 1997. Finally, at the district court's request, the Government was given yet another opportunity to file an additional supplemental memorandum in support of its position on June 3, 1997. At none of these junctures did the Government introduce the two affidavits and the statement.

In light of the ample opportunities the Government had to introduce the evidence in question prior to the district court's ruling on the motion to suppress, its articulated reasons for failing to do so ring hollow. First, the Government contends that it never believed that the district court would find Dickerson more credible than Special Agent Lawlor. Even if this explanation was tenable prior to the suppression hearing, Special Agent Lawlor's testimony on the primary issue in dispute, *i.e.*, whether Dickerson was read his *Miranda* warnings prior to his confession, was completely undermined by the Government's own documentary evidence, which supported Dickerson's version of events. After the hearing, therefore, the Government should have been firmly disabused of any misconceptions concerning whom the district court would find more credible. Because the Government was given the opportunity to file a supplemental memorandum after the hearing, the Government's failure to introduce the affidavits of Detective Durkin and Agent Wenko and the statement written by Dickerson cannot be explained by its first justification.

Next, the Government contends that it did not want to burden the district court with cumulative evidence. What the Government means by cumulative evidence is not entirely clear. Because every additional piece of evidence offered is, by definition, cumulative, cumulative evidence is not bad *per se*. Indeed, under the Federal Rules of Evidence it is the "needless presentation of cumulative evidence" that is to be avoided. /12 Fed. R. Evid. 403. With that understanding, the Government's [Page 19] argument necessarily assumes that Special Agent Lawlor's testimony should have been sufficient and that any additional evidence would, in fact, be needlessly cumulative. For the reasons stated above, however, the Government should have known after the hearing that additional evidence was not needlessly cumulative, but absolutely necessary. /13

In any event, why the Government would consider the statement written by Dickerson - in which he admits that he was read his *Miranda* warnings prior to implicating himself in a series of bank robberies - to be needlessly cumulative on the pivotal question of whether he was read his *Miranda* warnings prior to implicating himself in a series of bank robberies is difficult to understand. Evidence that is so probative that it would likely change the mind of the factfinder is not needlessly cumulative. *Cf.* 22 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5220, at 306 (1978) (noting similar principle under Rule 403). [Page 20]

In sum, because the district court gave the Government the opportunity to introduce the affidavits of Detective Durkin and Agent Wenko and Dickerson's hand-written statement after the suppression hearing, we conclude that the Government's failure to do so cannot adequately be explained by its proffered reasons. Accordingly, we cannot say that the district court abused its discretion in denying the Government's motion for reconsideration based upon its refusal to consider evidence that was in the Government's possession at the time of the initial hearing.

B.

Because "[a] district court by definition abuses its discretion when it makes an error of law," *Koon v. United States*, 116 S. Ct. 2035, 2047 (1996), we must address the Government's second proffered ground for reconsideration of the suppression ruling, namely whether § 3501, rather than *Miranda*, governs the admissibility of Dickerson's confession.

1.

Whether § 3501 or *Miranda* governs the admissibility of Dickerson's confession ultimately turns on the answers to two questions. Does § 3501 purport to supersede the rule set forth by the Supreme Court in *Miranda*? If it does, does Congress possess the authority legislatively to overrule *Miranda*? Prior to addressing these questions, however, we feel compelled to respond to the dissent's assertion that the question of § 3501's applicability is not properly before us.

Although raised by the Government in its motion for reconsideration, the applicability of § 3501 was not briefed by the Government on appeal. /14 We note, however, that this was no simple oversight. The [Page 21] United States Department of Justice took the unusual step of actually prohibiting the U.S. Attorney's Office from briefing the issue. To be sure, this was not an isolated incident. Over the last several years, the Department of Justice has not only failed to invoke § 3501, it has affirmatively impeded its enforcement.

For example, in *Davis v. United States*, 512 U.S. 452 (1994), which involved the defendant's attempt to suppress an incriminating statement [Page 22] made after an ambiguous request for counsel, the Department of Justice expressly declined to take a position on the applicability of § 3501. *See id.* at 457 n.*. As a result, the majority opinion declined to consider the issue. *See id.* (declining to reach issue because "we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position"). Justice Scalia, in a concurring opinion, chided the Department of Justice for its failure to invoke § 3501:

> The United States' repeated refusal to invoke § 3501, combined with the courts' traditional (albeit merely prudential) refusal to consider arguments not raised, has caused the federal judiciary to confront a host of *"Miranda"* issues that might be entirely irrelevant under federal law. Worse still, it may have produced - during an era of intense national concern about the problem of run-away crime - the acquittal and the nonprosecution of many dangerous felons, enabling them to continue their depredations upon our citizens. There is no excuse for this.

Id. at 465 (citations omitted). Justice Scalia further questioned whether the Department of Justice's failure to invoke § 3501 was "consistent with the Executive's obligation to 'take Care that the Laws be faithfully

executed. '" *Id.* (quoting U.S. Const. Art. II, § 3).

Over the past few years, career federal prosecutors have tried to invoke § 3501 in this Court only to be overruled by the Department of Justice. /15 In March of 1997, for example, the U.S. Attorney's [Page 23] Office in Alexandria, Virginia, appealed the suppression of a statement that the district court found was obtained in technical violation of *Miranda*. *See United States v. Sullivan*, 138 F.3d 126 (4th Cir. 1998). In its brief, the U.S. Attorney's Office urged this Court to reverse the district court on the basis of § 3501. The Department of Justice, however, ordered the U.S. Attorney's Office to withdraw its brief. In its place, a brief without any reference to § 3501 was filed. As a result, the Washington Legal Foundation and United States Senators Jeff Sessions, Jon Kyl, John Ashcroft, and Strom Thurmond filed an amicus brief urging this Court to consider the admissibility of Sullivan's confession under § 3501. Because we ultimately concluded that Sullivan was not in custody for *Miranda* purposes when the incriminating statements were made, we had no occasion to address the applicability of § 3501. *See id.* at 134 n.*.

In June of 1997, this Court issued an opinion upholding the suppression of a confession obtained in technical violation of *Miranda*. *See United States v. Leong*, 116 F.3d 1474 (4th Cir. 1997) (unpublished). Although the United States did not seek rehearing, the Washington Legal Foundation and the Safe Streets Coalition moved this Court for leave to proceed as amici curiae. In their motion, the putative amici took the Government to task for failing to assert the applicability of § 3501. As a result, we ordered the Department of Justice to address the effect of § 3501 on the admissibility of Leong's confession. In response, Attorney General Janet Reno, although purporting to follow the advice of her career prosecutors in other matters, notified Congress that the Department of Justice would not defend the [Page 24] constitutionality of § 3501, *see* 2 U.S.C.A. § 288k(b) (West 1997) (requiring the Department of Justice to notify the United States Congress whenever it will not defend the constitutionality of a federal statute), and filed with this Court a brief to the same effect. /16

Against this background, the Government's failure to raise the applicability of § 3501 on appeal in this case does not come as a surprise. Of even greater importance, neither does it prevent us from considering the applicability of § 3501 on appeal. Even where the parties abdicate their responsibility to call relevant authority to this Court's attention, *cf.* Va. Code Prof. Resp. 7-20, they cannot prevent us from deciding the case under the governing law simply by refusing to argue it, *see United States Nat'l Bank of Or. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 445-48 (1993). /17 Indeed, it is now well established that "the proper administration of the criminal law cannot be left merely to the stipulation of parties." *Young v. United States*, 315 U.S. 257, 259 (1942). [Page 25]

The dissent contends that "we are faced with essentially the same situation that the Supreme Court confronted in *Davis* when it refused to take up § 3501." *Post* at 49. We disagree. Although the Supreme Court declined *sua sponte* to consider the applicability of § 3501 in *Davis*, 512 U.S. at 457 n.*, that decision was influenced by prudential concerns not present here, *id.* at 465 (Scalia, J., concurring) (noting that the Court's decision not to consider the applicability of § 3501 was influenced by prudential concerns, rather than by statutory constraints on the Supreme Court's jurisdiction). As a general matter, "a court should avoid deciding a constitutional question when it can dispose of a case on another basis." *Jimenez v. BP Oil, Inc.*, 853 F.2d 268, 270 (4th Cir. 1988) (citing *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)). Having determined that the defendant's ambiguous reference to an attorney during a custodial interrogation was not a request for counsel for purposes of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), *see Davis*, 512 U.S. at 459, the Court had no reason to consider whether the defendant's confession was also admissible under the mandate of § 3501, especially because the Department of Justice had expressly declined to take a position on the provision's constitutionality, *see id.* at 457 n.*. Dickerson's confession, in contrast, was obtained in violation of *Miranda*. Thus, unlike the situation in *Davis*, we cannot avoid deciding the constitutional question associated with § 3501. Moreover, and again unlike the situation in *Davis*, the Department of Justice has now taken the position that § 3501 is unconstitutional. *See* Letter from Janet Reno, Attorney General, to Congress (Sept. 10, 1997) (notifying Congress that the Department of Justice will not defend the constitutionality of the statute). As a result, the specific prudential concerns that animated the Supreme Court's decision not to consider the applicability of

§ 3501 in *Davis* are simply not present here.

Furthermore, the primary reason for the Supreme Court's general reluctance to consider arguments not raised is not applicable to inferior federal courts such as this one. The Supreme Court "sits as a court of review." *Duignan v. United States*, 274 U.S. 195, 200 (1927). Thus, it generally will not consider issues "not pressed or passed upon below." *Id.*; *see also Pennsylvania Dep't of Corrections v. Yeskey*, 118 S. Ct. 1952, 1956 (1998) (declining to address issue that was not presented to either the District Court or the Court of Appeals); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where [Page 26] issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."). In contrast, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *see also United States Nat'l Bank of Or.*, 508 U.S. at 445-48 (stating that it was proper for the Court of Appeals to consider whether the controlling statute had been repealed despite the parties' failure to raise the issue).

Because the Department of Justice will not defend the constitutionality of § 3501 - and no criminal defendant will press the issue - the question of whether that statute, rather than *Miranda*, governs the admission of confessions in federal court will most likely not be answered until a Court of Appeals exercises its discretion to consider the issue. Here, the district court has suppressed a confession that, on its face, is admissible under the mandate of § 3501, *i.e.*, the confession was voluntary under the Due Process Clause, but obtained in technical violation of *Miranda*. As a result, we are required to consider the issue now. *Cf. Davis*, 512 U.S. at 464 (Scalia, J., concurring) (noting that the "time will have arrived" to consider the applicability of § 3501 the next time "a case that comes within the terms of th[e] statute is . . . presented to us"); *see also* Eric D. Miller, comment, *Should Courts Consider 18 U.S.C. § 3501 Sua Sponte?*, 65 U. Chi. L. Rev. 1029 (1998) (answering question in the affirmative).

a.

Having determined that the issue is properly before the panel, we must first determine whether § 3501 purports to supersede the rule set forth by the Supreme Court in *Miranda*. To do so, a brief history of the rules governing the admissibility of confessions before and after *Miranda* is in order. *See generally Development in the Law Confessions*, 79 Harv. L. Rev. 935 (1966) [hereinafter *Developments*].

"At early common law, confessions were admissible at trial without restrictions." *Id.* at 954; *see also McCormick's Handbook on the Law of Evidence* § 147, at 313 (1972) (Edward W. Cleary, ed., West 2d ed. 1972) (citing 3 Wigmore, Evidence § 818 (3d ed. 1940)). In the latter part of the eighteenth century, however, courts began to recognize [Page 27] that certain confessions were not trustworthy. *See, e.g., The King v. Rudd*, 168 Eng. Rep. 160 (K.B. 1783) (holding that "no credit ought to be given" to "a confession forced from the mind by the flattery of hope, or by the torture of fear"). Although several tests were developed to determine whether a confession was trustworthy, a confession was generally thought to be reliable only if made voluntarily. *See, e.g., Regina v. Garner*, 169 Eng. Rep. 267 (Ct. Crim. App. 1848); *Regina v. Baldry*, 169 Eng. Rep. 568 (Ct. Crim. App. 1852).

In *Hopt v. Utah*, 110 U.S. 574 (1884), the Supreme Court specifically adopted the common law rule that a confession was reliable, and therefore admissible, if it was made voluntarily. *Id.* at 584-85 (holding that a confession was voluntary if not induced by threat or promise) (citing *Regina v. Baldry*, 169 Eng. Rep. 568 (Ct. Crim. App. 1852)); *see also Pierce v. United States*, 160 U.S. 355, 357 (1896) (same). In subsequent cases, the Supreme Court applied the common law test of voluntariness to confessions. *See* Developments, *supra*, at 959. In so doing, the Court rejected the argument that a confession was involuntary simply because the suspect was in custody. *See Sparf v. United States*, 156 U.S. 51, 55 (1895). Similarly, in *Wilson v. United States*, 162 U.S. 613 (1896), the Supreme Court specifically held that the failure to warn a suspect of his right to remain silent and of his right to counsel did not render a confession involuntary. *Id.* at 624.

In *Bram v. United States*, 168 U.S. 532 (1897), the Supreme Court asserted, for the first time, a constitutional basis for its requirement that a confession be made voluntarily. *Id.* at 542 (stating that whether a confession is voluntary "is controlled by that portion of the fifth amendment . . commanding that no person `shall be compelled in any criminal case to be a witness against himself '" (quoting U.S. Const. amend. V.)). According to the Court, the Fifth Amendment privilege against self-incrimination "was but a crystallization" of the common law rule that only voluntary confessions are admissible as evidence. *Id.* Although the Supreme Court - prior to *Miranda* - would eventually place less reliance upon the approach taken in *Bram*, *see, e.g., United States v. Carignan*, 342 U.S. 36, 41 (1951) (expressing doubt about "[w]hether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from [Page 28] a rule that forced confessions are untrustworthy" (footnote omitted)), the Supreme Court in *Brown v. Mississippi*, 297 U.S. 278 (1936), invoked another constitutional basis for its requirement that a confession be made voluntarily: the Due Process Clause. *Id.* at 285-86. Thereafter, a confession was admissible only if voluntary within the meaning of the Due Process Clause. *See, e.g., Haynes v. Washington*, 373 U.S. 503 (1963); *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944); *Chambers v. Florida*, 309 U.S. 227 (1940).

Thus, prior to *Miranda*, the rule governing the admissibility of confessions in federal court - if not the rule's justification - remained the same for nearly 180 years: confessions were admissible at trial if made voluntarily. *See, e.g., Davis v. United States*, 512 U.S. 452, 464 (1994) (Scalia, J., concurring) (noting that prior to *Miranda*, "voluntariness *vel non* was the touchstone of admissibility of confessions"); *Miranda v. Arizona*, 384 U.S. 436, 506-07 (1966) (Harlan, J., dissenting) (noting that voluntariness has been the test for admitting confessions since the earliest days of the Republic). Indeed, in *Lisenba v. California*, 314 U.S. 219 (1941), the Supreme Court specifically referred to "voluntariness" as the federal test for determining the admissibility of confessions. *Id.* at 236.

Such was the stage in 1966 when the Supreme Court decided *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court announced a new analytical approach to the admissibility of confessions. Specifically, the Court rejected a case-by-case determination of whether a confession was voluntary. Instead, the Court held that any statement stemming from the custodial interrogation of a suspect would be presumed involuntary, and therefore inadmissible, unless the police first provided the suspect with four warnings. /18 Although the Court relied upon its prior decision in *Bram v. United States*, 168 U.S. 532 (1897) (holding that voluntariness is required by the Fifth Amendment), for support, *Miranda*, 384 U.S. at 461-62, the Court acknowledged that the Constitution requires no "particular [Page 29] solution for the inherent compulsions of the interrogation process," *id.* at 467, and left open the opportunity for the States and Congress to "develop their own safeguards for the privilege, so long as they are fully as effective as [the four warnings] in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it," *id.* at 490. The Court held that until that time, the warning "safeguards must be observed." *Id.* at 467.

Congress enacted § 3501 just two years after the Supreme Court decided *Miranda*. When interpreting an act of Congress, "our inquiry begins with an examination of the language used in the statute." *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 653 (4th Cir. 1996) (citing *Stiltner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1482 (4th Cir.), *cert. denied*, 117 S. Ct. 54 (1996)), *cert. denied*, 117 S. Ct. 738 (1997). Section 3501 provides as follows:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the

> circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant [Page 30] had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.
>
> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.
>
> (d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.
>
> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any seifincriminating statement made or given orally or in writing. [Page 31]

18 U.S.C.A. § 3501. The above-quoted statutory language is plain. Congress has provided that "a confession . . . shall be admissible in evidence if it is voluntarily given." 18 U.S.C.A. § 3501(a). Based upon the statutory language, it is perfectly clear that Congress enacted § 3501 with the express purpose of legislatively overruling *Miranda* and restoring voluntariness as the test for admitting confessions in federal court. *See, e.g.*, Stephen A. Saltzburg & Daniel J. Capra, *American Criminal Procedure* 545 (5th ed. 1996) (noting that "the intent of Congress was to `overrule ' *Miranda* in favor of a return to the `voluntariness' standard").

That Congress wished to return to a case-by-case determination of whether a confession was voluntarily given is undeniable. *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. Although certainly not dispositive, it is worth noting that the Senate Report accompanying § 3501 specifically stated that "[t]he intent of the bill is to reverse the holding of *Miranda v. Arizona*, 384 U.S. 436 (1966)." *Id.* at 2141. Indeed, although acknowledging that "[t]he bill would also set aside the holdings of such cases as *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957)," *id.*, the Report stated that *Miranda* "is the case to which the bill is directly addressed," *id.* Senate opponents likewise recognized that § 3501, by making voluntariness the sole criterion for the admissibility of confessions, was meant to repeal the irrebuttable presumption created by *Miranda*. *See id.* at 2210-11 (noting that § 3501 was "squarely in conflict with the Supreme Court's decision in *Miranda v. Arizona*").

Similarly, both proponents and opponents of § 3501 in the House of Representatives noted that the statute was meant to overrule the irrebuttable presumption created by *Miranda*. *See, e.g.*, 114 Cong. Rec. 16,066

(1968) (statement of Rep. Celler); *id.* at 16,074 (statement of Rep. Corman); *id.* at 16,278 (statement of Rep. Poff); *id.* at 16,279 (statement of Rep. Taylor); *id.* at 16,296 (statement of Rep. Randall); *id.* at 16,297-98 (statement of Rep. Pollock).

Although Congress enacted § 3501 with the express purpose of restoring voluntariness as the test for admitting confessions in federal court, it is important to note that Congress did not completely abandon the central holding of *Miranda, i.e.*, the four warnings are important [Page 32] safeguards in protecting the Fifth Amendment privilege against self-incrimination. Indeed, § 3501 specifically lists the *Miranda* warnings as factors that a district court should consider when determining whether a confession was voluntarily given. *See* 18 U.S.C.A. § 3501(b). Congress simply provided that the failure to administer the warnings to a suspect would no longer create an irrebuttable presumption that a subsequent confession was involuntarily given. *See id.* (providing that the *Miranda* warnings are not dispositive on the issue of voluntariness).

b.

Based on the statutory language alone, it is clear that Congress enacted § 3501 with the express purpose of returning to the pre- *Miranda* case-by-case determination of whether a confession was voluntary. We now turn to our next inquiry: Does Congress possess the authority to supersede the irrebuttable presumption created in *Miranda* that any unwarned statement to the police is involuntary, and therefore inadmissible?

Interestingly, much of the scholarly literature on *Miranda* deals not with whether Congress has the legislative authority to overrule the presumption created in *Miranda*, but whether it should. *Miranda* 's opponents, like Professor Paul Cassell, contend that thousands of violent criminals escape justice each year as a direct result of *Miranda*. *See, e.g.*, Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 Stan. L. Rev. 1055 (1998); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U. L. Rev. 1084 (1996); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U. L. Rev. 387 (1996). In contrast, its proponents, like Professor Stephen Schulhofer, argue that *Miranda* has had little impact on law enforcement's ability to obtain confessions. *See, e.g.*, Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 Nw. U. L. Rev. 500 (1996); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. Chi. L. Rev. 435 (1987). This debate, however, is one we need not enter. Whether Congress should overrule *Miranda* tells us nothing about whether it could. More importantly, it is not our role to answer that question. It is the province of the judiciary to determine what the [Page 33] law is, not what it should be. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

In *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the Court recently held that Congress does not possess the legislative authority to supersede a Supreme Court decision construing the Constitution. *See id.* at 2172 (refusing to enforce federal statute establishing more narrow test for violation of the Free Exercise Clause than prior test established by Supreme Court). On the other hand, Congress possesses the legislative authority to overrule judicially created rules of evidence and procedure that are not required by the Constitution. *See Palermo v. United States*, 360 U.S. 343, 345-48 (1959) (upholding federal statute establishing more narrow disclosure of *Jencks* material than prior rule established by Supreme Court); *see also Carlisle v. United States*, 517 U.S. 416, 426 (1996) (noting that the federal courts may formulate rules of evidence and procedure so long as they do not conflict with an Act of Congress); *Vance v. Terrazas*, 444 U.S. 252, 265 (1980) (upholding statute altering the evidentiary standard for expatriation proceedings established by the Supreme Court because prior standard created by the Court was not required by "the Constitution"). In fact, the power of the Supreme Court to prescribe nonconstitutional "rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." *Palermo*, 360 U.S. at 353 n.11 (citing *Funk v. United States*, 290 U.S. 371, 382 (1933), and *Gordon v. United States*, 344 U.S. 414, 418 (1953)).

Whether Congress has the authority to enact § 3501, therefore, turns on whether the rule set forth by the Supreme Court in *Miranda* is required by the Constitution. If it is, Congress lacked the authority to enact §

3501, and *Miranda* continues to control the admissibility of confessions in federal court. *See City of Boerne*, 117 S. Ct. at 2172. If it is not required by the Constitution, then Congress possesses the authority to supersede *Miranda* legislatively, and § 3501 controls the admissibility of confessions in federal court. *See Palermo*, 360 U.S. at 353 n.11.

Using the same analysis, several federal courts have found that § 3501 superseded the rule set forth in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957). *See United States v. Pugh*, 25 F.3d 669, 675 (8th Cir. 1994) (holding [Page 34] that § 3501 superseded the *McNabb/Mallory* rule); *United States v. Christopher*, 956 F.2d 536, 538-39 (6th Cir. 1991) (noting that § 3501, rather than *McNabb/Mallory*, governs the admissibility of confessions in federal court). In particular, the Eighth and Sixth Circuits first ascertained whether the rule set forth by the Supreme Court in *McNabb* and *Mallory* was required by the Constitution. *See Pugh*, 25 F.3d at 675; *Christopher*, 956 F.2d at 538-39. In *McNabb*, the Supreme Court exercised its supervisory power over the federal courts to exclude all incriminating statements, including voluntary confessions, obtained during an unreasonable delay between a defendant's arrest and initial appearance. *See* 318 U.S. at 343-44. In *Mallory* the Supreme Court affirmed the holding of *McNabb* under Rule 5(a) of the Federal Rules of Criminal Procedure. *See* 354 U.S. at 455-56. Finding that the rule set forth in *McNabb* and *Mallory* was not required by the Constitution, the Eighth and Sixth Circuits had little difficulty concluding that Congress possessed the legislative authority to overrule both cases. *See Pugh*, 25 F.3d at 675; *Christopher*, 956 F.2d at 538-39. /19

We begin our analysis then, with the Supreme Court's decision in *Miranda*. Several passages in Chief Justice Warren's opinion for the Court suggest that the warnings safeguard rights guaranteed by the [Page 35] Constitution. *See, e.g., Miranda*, 384 U.S. at 490 (noting that the privilege against self-incrimination is guaranteed by the Constitution). Surprisingly, the sixty-page opinion does not specifically state the basis for its holding that a statement obtained from a suspect without the warnings would be presumed involuntary. The Court strongly suggested, however, that the basis for the rule was identical to that set forth in *McNabb* and *Mallory*. *See id.* at 463. In particular, just as the "supervisory" rule set forth in *McNabb* and *Mallory* permitted the Court to avoid the constitutional issues associated with federal interrogations, *see id.*, the rule set forth in *Miranda* would allow the Court to avoid the constitutional issues associated with state interrogations, *see id.*

Although the Court failed to specifically state the basis for its holding in *Miranda*, it did specifically state what the basis was not. At no point does the Court refer to the warnings as constitutional rights. Indeed, the Court acknowledged that the Constitution did not require the warnings, *id.* at 467, disclaimed any intent to create a "constitutional straightjacket," *id.*, repeatedly referred to the warnings as "procedural safeguards," *id.* at 444, and invited Congress and the States "to develop their own safeguards for [protecting] the privilege," *id.* at 490.

Since deciding *Miranda*, the Supreme Court consistently (and repeatedly) has referred to the warnings as "prophylactic," *New York v. Quarles*, 467 U.S. 649, 654 (1984), and "not themselves rights protected by the Constitution," *Michigan v. Tucker*, 417 U.S. 433, 444 (1974); *see also Davis v. United States*, 512 U.S. 452, 457-58 (1994) (referring to *Miranda* warnings as "a series of recommended procedural safeguards" (internal quotation marks omitted)); *Withrow v. Williams*, 507 U.S. 680, 690-91 (1993) (acknowledging that "*Miranda* 's safeguards are not constitutional in character"); *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (noting that the *Miranda* warnings are not required by the Constitution); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (noting that "the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights"); *Oregon v. Elstad*, 470 U.S. 298, 306 (1985) (noting that the *Miranda* exclusionary rule "may be triggered even in the absence of a Fifth Amendment violation"); *Edwards v. Arizona*, 451 U.S. 477, 492 (1981) (Powell, J., concurring) (noting that the [Page 36] Court in *Miranda* "imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution").

One of the first opinions construing *Miranda* was *Harris v. New York*, 401 U.S. 222 (1971). In *Harris*, the defendant, charged with selling heroin, made several statements to the police prior to receiving his *Miranda*

warnings. *See id.* at 223-24. At trial, the defendant took the stand in his own defense. *See id.* at 223. During cross-examination, he was asked whether he had previously made any statements to the police that contradicted his direct testimony. *See id.* Although not admissible as substantive evidence, the Court held, per Chief Justice Burger, that the statements in question could be admitted for purposes of impeaching his credibility because, although obtained in technical violation of *Miranda*, the statements were made voluntarily. *See id.* at 224-25; *cf. Mincey v. Arizona*, 437 U.S. 385, 401-02 (1978) (holding that involuntary statements, as opposed to statements made in technical violation of *Miranda*, could not even be admitted for impeachment purposes).

In *Tucker*, the Supreme Court was asked to apply the "tainted fruits" doctrine from *Wong Sun v. United States*, 371 U.S. 471 (1963), to the testimony of a witness whose identity was discovered as the result of a statement obtained from the defendant in violation of *Miranda*. *See* 417 U.S. at 436-37. In declining to extend the "tainted fruits" doctrine to the facts in *Tucker*, the Court noted that the unwarned questioning did not abridge the defendant's Fifth Amendment privilege, "but departed only from the prophylactic standards later laid down by this court in *Miranda* to safeguard that privilege." 417 U.S. at 445-46. Because the defendant's constitutional rights were not infringed, the Court in *Tucker* determined that the "fruit of the poisonous tree" doctrine did not apply. *Id.* at 445-46 & n.19.

In *Quarles*, the Supreme Court was asked by the State of New York to recognize an emergency exception to *Miranda*. *See* 467 U.S. at 649. In that case, a young woman told two police officers that she had just been raped, that her assailant had just entered a nearby store, and that he was carrying a gun. After entering the store the officers quickly spotted the defendant. After a short chase, the defendant was caught and searched. Because he was wearing an empty shoulder holster, the arresting officer asked him, prior to reading him his *Miranda* [Page 37] warnings, where the gun was located. *See id.* at 651-52. The defendant nodded in the direction of some empty cartons and stated, "the gun is over there." *Id.* at 652. Although obtained in technical violation of *Miranda*, the Government sought to introduce the defendant's statement in its case-in-chief. In recognizing an emergency exception to *Miranda*, the Supreme Court relied exclusively upon the fact that a violation of *Miranda* was not necessarily a violation of the Constitution. *See id.* at 654 (stating that "[t]he prophylactic *Miranda* warnings . . . are `not themselves rights protected by the Constitution '" (quoting *Tucker*, 417 U.S. at 444)); *see also* Saltzburg & Capra, *supra*, at 555-56 ("[I]f the *Miranda* safeguards were constitutionally required, then presumably any confession obtained in violation of them would have to be excluded - even if the officer was faced with a situation where giving the safeguards may have posed a threat to public safety.").

When presented with another opportunity to extend the *Wong Sun* "tainted fruits" doctrine, the Supreme Court in *Oregon v. Elstad*, 470 U.S. 298 (1985), once again declined the invitation to do so. In *Elstad*, two officers went to the defendant's home with a warrant for his arrest. *See id.* at 300. After executing the warrant, the officers questioned the defendant about his role in the burglary of a neighbor's house. *See id.* at 301. As a result of the interrogation, the defendant confessed to the burglary. *See id.* The defendant was then escorted to the police station where the officers advised him for the first time of his *Miranda* rights. After waiving his rights, the defendant once again confessed to the burglary. *See id.* Later, the defendant sought to suppress his second confession as the "fruit of the poisonous tree," arguing that it was obtained only as the result of his first confession that was made in violation of *Miranda*. *See id.* at 302. The *Elstad* majority, however, held that the "tainted fruits" doctrine did not apply to the second confession for the same reasons the doctrine did not apply in *Tucker*. *See id.* at 308. Specifically, the Court held that "[s]ince there was no actual infringement of the suspect's constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a *constitutional* violation must be suppressed." *Id.* (emphasis added).

Of particular importance here, the Court in *Elstad* made the following observation about *Miranda:* [Page 38]

> The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda* 's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.
>
> But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination.

Id. at 306-07 (internal footnotes and citations omitted).

In light of the foregoing cases, it is certainly "well established that the failure to deliver *Miranda* warnings is not itself a constitutional violation." *United States v. Elie*, 111 F.3d 1135, 1142 (4th Cir. 1997) (citing Supreme Court cases); *see also Correll v. Thompson*, 63 F.3d 1279, 1290 (4th Cir. 1995) (holding that "a technical violation of *Miranda* [is not necessarily] a Fifth Amendment violation"). As a consequence, the irrebuttable presumption created by the Court in *Miranda* - that a confession obtained without the warnings is presumed involuntary - is *a fortiori* not required by the Constitution. /20 [Page 39]

Accordingly, Congress necessarily possesses the legislative authority to supersede the conclusive presumption created by *Miranda* pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts. *See Carlisle v. United States*, 517 U.S. 416, 426 (1996); *Vance v. Terrazas*, 444 U.S. 252, 265 (1980); *Palermo v. United States*, 360 U.S. 343, 345-48 (1959); *cf.* Alfredo Garcia, *Is Miranda Dead, Was It Overruled, Or Is It Irrelevant?*, 10 St. Thomas L. Rev. 461, 461-65, 479 (1998) (concluding that § 3501 "overruled *Miranda*" but arguing that *Miranda* was already dead). /21

It is worth recalling that Congress not only acted in response to the Court's invitation, *see Miranda*, 384 U.S. at 490 (inviting Congress and the States "to develop their own safeguards for [protecting] the privilege"), but that the Court in *Miranda* had acted in the absence of a relevant Act of Congress. It is well established that the Court's power to prescribe nonconstitutional "rules of procedure and evidence [Page 40] for the federal courts exists only in the absence of a relevant Act of Congress." *Palermo*, 360 U.S. at 353 n.11. Thus, just as the Court was free to create an irrebuttable presumption that statements obtained without certain procedural safeguards are involuntary, Congress was free to overrule that judicially created rule.

To be sure, the *Miranda* warnings were meant to safeguard the Fifth Amendment privilege against self-incrimination. Indeed, under § 3501 any statement obtained in violation of the privilege must be suppressed. Thus, we cannot say that Congress's decision to eliminate the irrebuttable presumption created by *Miranda* lessens the protections afforded by the privilege. Indeed, the Court has recognized that *Miranda* 's irrebuttable presumption goes beyond what is required to protect the privilege. As a result, even "patently *voluntary* statements . . . must be excluded." *Elstad*, 470 U.S. at 307. In enacting § 3501, Congress simply recognized the need to offset the harmful effects created by *Miranda* 's irrebuttable presumption. /22 *Cf. Sandstrom v.* [Page 41] *Montana*, 442 U.S. 510, 523 (1979) (recognizing the harmful effects created by the use of mandatory conclusive presumptions in criminal cases). No longer will criminals who have voluntarily confessed their crimes be released on mere technicalities.

Finally, lest there be any confusion on the matter, nothing in today's opinion provides those in law enforcement with an incentive to stop giving the now familiar *Miranda* warnings. As noted above, those warnings are among the factors a district court should consider when determining whether a confession was voluntarily given. *See* 18 U.S.C.A. § 3501(b). Indeed, federal courts rarely find confessions obtained in technical compliance with *Miranda* to be involuntary under the Fifth Amendment. *Cf. Elie*, 111 F.3d at 1143 (noting "that very few incriminating statements, custodial or otherwise, are held to be involuntary" (internal

quotation marks omitted)). Thus, providing [Page 42] the four *Miranda* warnings is still the best way to guarantee a finding of voluntariness.

In the end, and after an exhaustive review of the relevant authority, we are convinced that § 3501 - enacted at the invitation of the Supreme Court and pursuant to Congress's unquestioned power to establish the rules of procedure and evidence in the federal courts - is constitutional. We are reassured in our conclusion by the fact that our dissenting colleague, after examining all of the relevant authority at his disposal, has been unable to conclude differently. At best, the dissent can but pose a rhetorical question concerning the constitutionality of § 3501. *See ante* note 21. Apparently, all of the relevant authority of which the dissent is aware supports the conclusion we reach today. As a consequence, we have no difficulty holding that the admissibility of confessions in federal court is governed by § 3501, rather than the judicially created rule of *Miranda*.

2.

Having concluded that § 3501, rather than *Miranda*, governs the admissibility of confessions in federal court, our next step ordinarily would be to remand the case for a determination of whether Dickerson's confession was voluntary. That is unnecessary in this case, however, because the district court has already made that finding.

Although the district court suppressed the statements obtained in violation of *Miranda*, it nevertheless denied Dickerson's motion to suppress the evidence found as a result thereof, *e.g.*, the statement made by Rochester identifying Dickerson as the getaway driver. In making this determination, the district court stated that it was bound by this Court's decision in *United States v. Elie*, 111 F.3d 1135 (4th Cir. 1997). *See United States v. Dickerson*, 971 F. Supp. 1023, 1024 n.1 (E.D. Va. 1997). In *Elie*, we held that evidence found as a result of a statement made in violation of *Miranda* may only be suppressed if the statement was involuntary within the meaning of the Due Process Clause of the Fifth Amendment. Therefore, by declining to suppress the evidence found as a result of Dickerson's unwarned statements, the district court necessarily found that Dickerson's statements were voluntary under the Fifth Amendment. [Page 43]

During oral argument, Dickerson's counsel contended that the district court erred in finding that the statements in question were voluntary for purposes of the Fifth Amendment. The district court's finding on this matter, however, is currently unreviewable. *See, e.g., United States v. Becker*, 23 F.3d 1537, 1539 (9th Cir. 1994) (noting that the denial of a motion to suppress is not an appealable final order).

IV.

On appeal, the Government also contends that the district court erred in suppressing the fruits of the warrant-authorized search of Dickerson's apartment. The district court concluded that the warrant was insufficiently particular in describing the items to be seized. Moreover, the district court concluded that the agents executing the warrant could not have acted in good-faith because the warrant was facially deficient. We address these two rulings in turn.

A.

The warrant in question was obtained by Special Agent Lawlor via the telephone pursuant to Rule 41(c)(2) of the Federal Rules of Criminal Procedure. In his sworn oral testimony to Judge Kenkel, Special Agent Lawlor described the circumstances of the bank robbery, including that the robber used a handgun, carried a bag, requested unmarked bills, and left the scene in a car registered to Dickerson. In the section of the warrant used to identify the property to be seized, Special Agent Lawlor wrote: "Evidence of the crime of bank robbery." Whether that description, coupled with the description contained in Special Agent Lawlor's oral testimony, is sufficiently particular to pass constitutional scrutiny is a legal issue subject to de novo review. *See United States v. Hyppolite*, 65 F.3d 1151, 1156 (4th Cir. 1995).

The Fourth Amendment provides that a search warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Supreme Court has identified two important purposes underlying the particularity requirement: (1) preventing general searches, and (2) ensuring that the executing officer is able to distinguish between those items which are to be [Page 44] seized and those that are not. *See Marron v. United States*, 275 U.S. 192, 196 (1927).

The Government argues that the warrant neither authorized an improper general search nor left to the discretion of the agents executing the warrant what to seize. Specifically, the Government contends that the warrant directed the agents to search for evidence of a particular crime - bank robbery - that tends to generate quite distinctive evidence, *e.g.*, guns, masks, bait money, dye-stained bills and clothes, carrying bags. The test for the necessary particularity of a search warrant is "a pragmatic one: The degree of specificity required when describing the goods to be seized may necessarily vary according to the circumstances and type of items involved." *United States v. Torch*, 609 F.2d 1088, 1090 (4th Cir. 1979) (internal quotation marks omitted).

Some courts uphold warrants that identify the items to be seized as "evidence of [specific crime]" only "where a more precise description was not possible in the circumstances." *United States v. George*, 975 F.2d 72, 76 (2d Cir. 1992) (citing cases). Here, the Government admits, as it must, that it could have been more precise, but argues that this Court has routinely upheld warrants directing the police to search for evidence of a particular crime. *See* Appellant's Br. at 36-37 (citing *United States v. Fawole*, 785 F.2d 1141, 1144 (4th Cir. 1986), and *United States v. Ladd*, 704 F.2d 134 (4th Cir. 1983)).

As the Government correctly notes, the law of this Circuit does allow some discretion to the officers executing a search warrant, so long as the warrant at least minimally "confines the executing officers' discretion by allowing them to seize only evidence of a particular crime." *Fawole*, 785 F.2d at 1144. For example, in *Ladd* we upheld a warrant directing the police to seize all property relating to "the smuggling, packing, distribution, and use of controlled substances," as satisfying fully the particularity requirement. 704 F.2d at 136. Indeed, the panel in *Ladd* specifically held that "[m]ore specificity is not required by the Constitution." *Id.; see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.6(d), at 567 & n.81 (3d ed. 1996) (noting that "[s]ometimes a warrant will not attempt to describe instrumentalities except by reference to the criminal conduct in which they have been used") (collecting cases). [Page 45]

As explained by the Second Circuit in *George*, a warrant authorizing a search for evidence relating to "a broad criminal statute or general criminal activity" such as "wire fraud," "fraud," "conspiracy," or "tax evasion," is overbroad because it "provides no readily ascertainable guidelines for the executing officers as to what items to seize." 975 F.2d at 76. In contrast, a warrant authorizing a search for evidence relating to "a specific illegal activity," such as "narcotics," or "theft of fur coats" is sufficiently particular. *Id.* (citing cases). The warrant in the instant case limited the agents' search to evidence relating to the commission of a particular crime: bank robbery. Bank robbery is a specific illegal activity that, as the Government notes, generates quite distinctive evidence. Though certainly broad in its description, we cannot say that the warrant failed to provide that degree of specificity required by the precedent of this Court.

The search of Dickerson's apartment produced a silver .45 caliber handgun, dye-stained money, a bait bill from another robbery, ammunition, masks, and latex gloves. /23 Rather than conducting an impermissible fishing expedition, it is clear that the agents conducting the search only seized those items reasonably associated with the crime of bank robbery. Thus, it is evident that the warrant was sufficiently definite so that the agents executing it were able to identify the property sought with reasonable certainty. As a consequence, we conclude that "evidence of the crime of bank robbery" adequately distinguishes between those items which are to be seized and those which are not. *See Marron*, 275 U.S. at 196.

In sum, the nature of a bank robbery is such that the evidence thereof is reasonably subject to identification. Since "[t]he degree of specificity required when describing the goods to be seized . . . var[ies] according to the . . . type of items involved," *Torch*, 609 F.2d at 1090, we have little difficulty concluding that the warrant was sufficiently particular in describing the items to be seized.

B.

Moreover, even if we assume that the warrant was not sufficiently [Page 46] particular in describing the items to be seized, we nevertheless would conclude that the evidence obtained during the search of Dickerson's apartment was admissible pursuant to the good faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897, 913 (1984). In deciding whether the good faith exception applies, this Court must consider "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." *Id.* at 922 n.23. This inquiry is objective in nature, depending upon the understanding of a reasonable officer in light of the totality of the circumstances. *See Hyppolite*, 65 F.3d at 1156.

In light of the totality of the circumstances, we conclude that the warrant in this case was not so facially deficient as to preclude reasonable reliance upon it. First, the warrant specified that the items to be seized consisted of evidence associated with bank robbery. Thus, it did not fail to provide the searching officers any guidance whatsoever as to the subject of the search.

Second, this Court considers the knowledge of the searching officers in assessing the objective reasonableness of reliance upon a warrant. *See United States v. Curry*, 911 F.2d 72, 78 (8th Cir. 1990) (noting that "in assessing whether reliance on a search warrant was objectively reasonable under the totality of the circumstances, it is appropriate to take into account the knowledge that an officer in the searching officer's position would have possessed"). Agent Wenko, who was the lead agent during the search of Dickerson's apartment, was familiar not only with the specifics of the bank robbery in question, but, perhaps as important, had been investigating bank robberies for seven years and thus was very familiar with the type of evidence to look for *(e.g.*, guns, money, bait bills, dye-stained money and clothes, disguises, carrying bags, and gloves).

For the foregoing reasons, we conclude that the district court erred in finding that the agents could not have acted in good-faith reliance on the warrant.

V.

In conclusion, we find that the admissibility of confessions in federal court is governed by 18 U.S.C.A. § 3501 (West 1985), rather than [Page 47] *Miranda*, that the warrant was sufficiently particular in describing the items to be seized, and that the officers executing the warrant acted in good faith. Accordingly, the district court's order suppressing the statements Dickerson made at the FBI Field Office and the physical evidence obtained during the search of his apartment is reversed, and the case is remanded for further proceedings.

REVERSED AND REMANDED.

FOOTNOTES

/1 The district court also suppressed the physical evidence obtained during the search of Dickerson's apartment because the warrant was not sufficiently particular in describing the items to be seized. Finding that the warrant was sufficiently particular in describing the items to be seized, *see post* part IV.A, or, in the alternative, that the officers executing the warrant acted in good faith, *see post* part IV.B, we reverse that ruling also.

/2 Dickerson testified at the suppression hearing that he did not feel he had a choice about whether to accompany the agents to the field office.

/3 Because the warrant was obtained over the telephone, Judge Kenkel was not able to sign the warrant personally. Instead, Judge Kenkel instructed Special Agent Lawlor to sign the Judge's name, followed by a slash and Special Agent Lawlor's name, on the line used to identify the name of the judicial officer

authorizing the warrant.

/4 Dickerson told Special Agent Lawlor and Detective Durkin that he had the handgun in question in his hand when the agents knocked on the door of his apartment.

/5 The Government does not challenge on appeal the district court's finding that Dickerson was in police custody for *Miranda* purposes when he was initially brought to the FBI Field Office.

/6 The documentary evidence, which clearly contradicted Special Agent Lawlor's testimony, was not the only reason the district court gave for finding that Special Agent Lawlor's testimony lacked credibility. First, Special Agent Lawlor testified that when he knocked on Dickerson's door he did not have his gun drawn and "didn't expect one way or the other" whether his colleagues would have their guns drawn. The district court found it "simply not credible for a well-trained Special Agent of the FBI to assert that" he did not expect his colleagues to have their weapons drawn when confronting a suspect in an armed bank robbery. (J.A. at 95 n.7.) Second, Special Agent Lawlor told Judge Kenkel that a telephonic warrant was necessary because Dickerson was not under arrest and could easily go home and destroy any evidence of the bank robbery. The district court concluded that "[i]t strains credibility to believe that the FBI would simply release" Dickerson. (J.A. at 90 n.3.) Third, Special Agent Lawlor testified that Judge Kenkel instructed him to write "evidence of the crime of bank robbery" in the section of the warrant used to identify the property to be seized. The district court found "nothing in the transcript of the telephonic application for the warrant to support" this testimony. (J.A. at 84 n.1.)

Although the district court is uniquely suited for assessing witness credibility, *see United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 339 (1952), the aforementioned credibility determinations were, as the district court acknowledged, not based on the cadence, tone, or inflection of Special Agent Lawlor's voice. Nor, for that matter, were they based on any other factor that would be difficult to evaluate on appeal. Instead, they were based on the content of his testimony. As a result, we are as uniquely suited for assessing these particular findings as the district court.

We cannot say that Special Agent Lawlor's explanation for seeking a telephonic warrant strains credibility. Although the agents had probable cause to arrest Dickerson, there is no requirement that the police arrest a suspect the very moment that probable cause is established. Indeed, there are legitimate law enforcement reasons not to do so. *See, e.g., United States v. Lovasco*, 431 U.S. 783, 791 (1977) (noting that there are legitimate reasons not to arrest a suspect the moment probable cause is established); *United States v. Jones*, 18 F.3d 1145, 1155 (4th Cir. 1994) (recognizing that need to delay arrests even after probable cause is established). As such, we do not believe, as the district court seemingly suggests, that a telephonic warrant was improperly obtained in this case, *see* Fed. R. Crim. P. 41(c) (2) (authorizing telephonic warrants), or that Special Agent Lawlor was untruthful when he testified that the agents did not intend to arrest Dickerson without additional evidence.

We also cannot say that "nothing" in the transcript of the telephonic application supports Special Agent Lawlor's testimony that Judge Kenkel instructed him to write "evidence of the crime of bank robbery" in the section of the warrant used to identify the property to be seized. An examination of the transcript reveals that Judge Kenkel instructed Special Agent Lawlor on what to write in virtually every section of the warrant. Although Judge Kenkel did not specifically tell Special Agent Lawlor what to write in the section in question, he did state that there was probable cause to search Dickerson's apartment for "evidence of . . . the bank robbery in question." (J.A. at 69.)

/7 An affidavit attached to the warrant identified the following items:

a. A black leather backpack, and its contents;

b. Currency;

c. Clothing and disguises;

d. Items stained by dye from explosive dye-packs;

e. Firearms, ammunition, and pellet guns;

f. Money or cash straps;

g. Demand notes;

h. Carrying bags;

i. Photographs, in particular, photographs of co-conspirators;

j. Address books, Rolodexes, or other documents containing names of co-conspirators; and

k. Evidence of the disposition of cash obtained in bank or armed robberies.

(J.A. at 85-86.)

/8 Although 7:30 p.m. does not correspond with the time that either Detective Durkin or Special Agent Lawlor gave for when Dickerson was read his *Miranda* rights, Detective Durkin explained in his affidavit that when Dickerson wrote 7:30 p.m., he "specifically recall[ed] thinking that Dickerson had no idea what time it was." (J.A. at 121.) In any event, the hand-written statement does correspond with the sequence of events that is so crucial to this appeal. Specifically, the statement corroborates the agents' position that Dickerson was read his *Miranda* warnings prior to his confession.

/9 Dickerson's hand-written statement reads, in pertinent part, as follows:

> I was read my rights at 7:30 [b]ut I was here at 5:30. I talked to the two Detectives . . . [for] two and a half hours and then was asked to take a polygraph test. I declined because after two hours I had knowledge of the bank robbery. I told them I know nothing of the bank robbery that happened Friday. Befor[e] today I didn't have any knowle[dge] of the bank robbery.

(J.A. at 123.)

/10 Dickerson contends that federal law does not grant the Government the right to appeal an order denying reconsideration of a suppression ruling. It is well established that the Government cannot appeal an adverse ruling in a criminal prosecution without statutory authority. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977); *United States v. Sanges*, 144 U.S. 310, 312 (1892). Such authority, the Government maintains, is contained in 18 U.S.C.A. § 3731 (West Supp. 1998). *See United States v. Scott*, 437 U.S. 82, 84-85 (1978) (discussing the enactment of § 3731 to provide government appeals in criminal cases).

Section 3731 provides, in pertinent part, as follows:

> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence.
>
> . . . .
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

18 U.S.C.A. § 3731. Although § 3731 authorizes the Government to appeal orders suppressing evidence, Dickerson contends that it does not expressly authorize the Government to appeal a decision denying reconsideration of a suppression ruling. The issue, not heretofore decided by this Court, is whether § 3731, which provides that it should be liberally construed to effectuate its purposes, can be so construed as to authorize this appeal. We conclude, for the reasons that follow, that it can.

In *United States v. Ibarra*, 502 U.S. 1 (1991) (per curiam), the defendant was indicted for possession of cocaine with intent to distribute. *See id.* at 2. The district court, however, ordered that certain evidence be suppressed. *See United States v. Ibarra*, 725 F. Supp. 1195, 1202 (D. Wyo. 1989). The Government filed a motion for reconsideration, which was denied. *See United States v. Ibarra*, 731 F. Supp. 1037, 1041 (D. Wyo. 1990). On appeal, the Tenth Circuit dismissed the Government's appeal as untimely. *See United States v. Ibarra*, 920 F.2d 702, 707 (10th Cir. 1990) (holding that appeal must be filed within thirty days of a district court's suppression ruling). On petition for certiorari, the Supreme Court held that the thirty-day period in which the Government was required to file its appeal under § 3731 began to run on the date that the district court denied the Government's motion for reconsideration, not on the date of the district court's original suppression order. *See Ibarra*, 502 U.S. at 6-7. In so holding, the Supreme Court necessarily concluded that § 3731 authorizes the Government to appeal a decision denying reconsideration of a suppression ruling.

Our conclusion that we have jurisdiction to hear this appeal is also buttressed by the knowledge that, in enacting § 3731, "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337 (1975); *see also Arizona v. Manypenny*, 451 U.S. 232, 247 & n.24, 249 (1981) (noting that Government appeals are permitted to the extent that they are not prohibited by the Constitution). Dickerson does not contend that the instant appeal is constitutionally prohibited. Thus, Dickerson's suggestion that we lack jurisdiction to hear this appeal is without merit. *Accord United States v. Hassan*, 83 F.3d 693, 697 (5th Cir. 1996) (holding that "'an appeal from a denial of a motion to reconsider necessarily raises the underlying [suppression] judgment for review'" (quoting *United States v. Herrold*, 962 F.2d 1131, 1136 (3d Cir. 1992))); *United States v. Roberts*, 978 F.2d 17, 18 (1st Cir. 1992) (entertaining Government's appeal from the denial of a motion to reconsider a suppression ruling).

/11 We note that granting a new trial on the basis of evidence available at the time of the trial is strictly prohibited. *See, e.g., United States v. Bales*, 813 F.2d 1289, 1295 (4th Cir. 1987) (noting that under Fed. R. Crim. P. 33 "the evidence must be, in fact, newly discovered, *i.e.*, discovered since the trial"); *United States v. Singh*, 54 F.3d 1182, 1190 (4th Cir. 1995) (same). Of course, Rule 33 of the Federal Rules of Criminal Procedure, which governs new trial motions, does not apply to motions for reconsideration of evidentiary rulings prior to trial. As such, granting a motion for reconsideration on the basis of evidence available to the movant at the time of the suppression hearing is not strictly prohibited.

/12 We do not mean to imply that the Federal Rules of Evidence are binding at a suppression hearing; they are not. *See* Fed. R. Evid. 104(a) (providing that the rules of evidence are not binding at a preliminary proceeding). We refer to Rule 403 only because it casts some light on the phrase "cumulative evidence."

/13 In its motion for reconsideration, the Government confessed that "this [was] one of those deals where they [threw] the case at [the Assistant United States Attorney] at 4:00 on the day before [the hearing]." *United States v. Dickerson*, 971 F. Supp. 1023, 1025 n.2 (E.D. Va. 1997) (final alteration in original). Similarly, during the hearing on the motion to reconsider the Government acknowledged "that the Assistant United States Attorney had very little time to prepare [Special] Agent Lawlor." *Id.* at 1024. Had the Government simply compared Special Agent Lawlor's recollection of events against its documentary evidence prior to the suppression hearing, it would have discovered the need to introduce additional evidence.

While we respect the Government's candidness on this point, it raises further questions relating to the proffered reasons for failing to present the additional affidavits and statement earlier. For example, if the

Government failed to prepare and present its case properly, we wonder how it could have known that additional evidence would be needlessly cumulative.

/14 Pursuant to Local Rule 27(c), the clerk's office granted the unopposed motion of the Washington Legal Foundation and the Safe Streets Coalition (amici) to file a brief in this case. In light of the Government's unwillingness to defend the constitutionality of § 3501, amici also sought leave to share five minutes of the Government's allotted oral argument time. Under the Federal Rules of Appellate Procedure, "[a] motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons." Fed. R. App. P. 29. Because the Department of Justice's refusal to defend the constitutionality of an Act of Congress is an extraordinary event, we granted amici's motion to share oral argument time with the Government. Indeed, federal courts have frequently appointed amici to participate in oral argument where neither side will defend an important position. *See, e.g., Bousley v. United States*, 118 S. Ct. 1604, 1609 (1998) (inviting private party to file an amicus brief and to participate in oral argument when Government declined to defend ruling in its favor); *Bob Jones Univ. v. United States*, 461 U.S. 574, 585 n.9, 599 n.24 (1983) (same); *McKinney v. Indiana Michigan Power Co.*, 113 F.3d 770, 772 n.2 (7th Cir. 1996) (appointing amicus "so that [the court] might have the benefit of an adversary presentation of the issues raised by the appeal"); *United States v. Chagra*, 701 F.2d 354, 366 (5th Cir. 1983) (appointing amicus "to ensure that this appeal continues to be presented in an adversary context").

Amici urged this Court, both in its brief and during oral argument, to consider the admissibility of Dickerson's confession under the mandate of § 3501. Although we had the benefit of amici's briefing, the dissent criticizes our application of § 3501 "without the benefit of any briefing in opposition." *Post* at 47. Although we would have preferred to have had such briefing, the Department of Justice, as we note in greater detail above, actually prohibited the U.S. Attorney's Office from briefing § 3501 in this case. *Cf.* Letter from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys and all Criminal Division § Chiefs (Nov. 6, 1997) (forbidding "federal prosecutors [from] rely[ing] on the voluntariness provision of § 3501"). Moreover, when pressed at oral argument, counsel for the United States informed the Court that he had been prohibited by his superiors at the Department of Justice from discussing § 3501. Because it is our duty to apply the governing law to every case or controversy before us, it was unfortunately necessary to proceed without any briefing from the Department of Justice.

/15 Justice's refusal to invoke § 3501 has not been limited to this Circuit. In *Cheely v. United States*, 21 F.3d 914 (9th Cir. 1994), the Ninth Circuit suppressed an incriminating statement that was obtained in technical violation of *Edwards*. *Id.* at 923. Although the Government did not petition for rehearing, the Ninth Circuit *sua sponte* asked the parties whether the case merited rehearing en banc. *See Cheely v. United States*, 92-30257 (9th Cir. May 25, 1994) (unpublished order). Curiously, Justice filed a memorandum opposing further review. One week later, the Supreme Court in *Davis v. United States*, 512 U.S. 452 (1994), would bring § 3501 to the attention of the legal community. In response, a career federal prosecutor sent a letter to the Ninth Circuit apprising them of the Court's decision in *Davis*. Later that same day, Solicitor General Drew Days withdrew the earlier letter and replaced it with a letter that downplayed the relevance of *Davis* to the issues at hand. Notwithstanding the letter from the Solicitor General, the Ninth Circuit "called for supplemental briefing from the parties as to the effect *Davis* might have on our conclusion" to suppress the statements in question. *Cheely v. United States*, 36 F.3d 1439, 1448 (9th Cir. 1994). Although Justice filed a supplemental brief, it nevertheless failed to even argue the applicability of § 3501. Upon reconsideration, the Ninth Circuit still suppressed the statement. *See id.*

/16 The Department of Justice has taken the position that unless the Supreme Court overrules *Miranda*, "the United States is not free to urge the lower courts" to "rely on § 3501." *See* Letter from John C. Keeney, Acting Assistant Attorney General, to all United States Attorneys and all Criminal Division § Chiefs (Nov. 6, 1997) (noting that "[t]he Department has not yet decided whether it would ask the Supreme Court in an appropriate case to overrule or modify *Miranda*").

/17 The dissent argues, and we do not dispute, that "the only issues not raised by the parties that we are *required* to consider are those of subject matter jurisdiction and justiciability." *Post* at 48 (emphasis added).

That observation, however, is of no real import. First, as we note above, this Court may, in its discretion, consider issues not raised below. *See post* at 25-26. Second, and more importantly, we are not considering an issue that was not raised by the parties. The issue on appeal is the district court's suppression ruling. Without question, we are free to address ourselves to any legal theory that would bear on the issue under appeal. *See Shafer v. Preston Memorial Hosp. Corp.*, 107 F.3d 274, 275 n.1 (4th Cir. 1997) ("We have consistently recognized that we may [decide a case] on different grounds than those employed by the district court."); *Jackson v. Kimel*, 992 F.2d 1318, 1322 (4th Cir. 1993) (same). Thus, because the Government has appealed the district court's suppression ruling, we are free to consider the applicability of § 3501.

/18 The four warnings are: (1) that the suspect has the right to remain silent; (2) that any statements he makes can be used against him; (3) that he has the right to the presence of an attorney during questioning; and (4) that an attorney will be appointed for him if he cannot afford one. *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

/19 Interestingly, although this Court has not addressed the effect of § 3501 on either *Miranda* or *McNabb/Mallory*, we have repeatedly cited the provision when making voluntariness determinations without ever suggesting that any part of the section is unconstitutional. *See, e.g., United States v. Braxton*, 112 F.3d 777, 784 & n.* (4th Cir.) (en banc), *cert. denied*, 118 S. Ct. 192 (1997); *United States v. Wilson*, 895 F.2d 168, 172-73 (4th Cir. 1990); *United States v. Pelton*, 835 F.2d 1067, 1074 (4th Cir. 1987); *United States v. Peoples*, 748 F.2d 934, 936 (4th Cir. 1984); *United States v. Gonzales*, 736 F.2d 981, 983 (4th Cir. 1984); *United States v. Dodier*, 630 F.2d 232, 236 (4th Cir. 1980); *United States v. Sauls*, 520 F.2d 568, 569 (4th Cir. 1975); *United States v. Johnson*, 495 F.2d 378, 382 (4th Cir. 1974). Indeed, in *United States v. Van Metre*, 150 F.3d 339 (4th Cir. 1998), we recently held that a fifty-five hour delay between the defendant's arrest and arraignment did not render the defendant's confession inadmissible, without citing either *McNabb* or *Mallory*, because under the mandate of § 3501 such delay "is only one factor to be considered when determining the admissibility of a confession." *Id.* at 348-49.

/20 Conclusive presumptions are "designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). As the Supreme Court has explained in another context: "*Per se* rules . . . require the Court to make broad generalizations. . .. Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). It is apparent, therefore, that conclusive presumptions, like the one contained in *Miranda*, are dictated by convenience, not the Constitution.

/21 The dissent does not dispute that the applicability of § 3501 turns on whether *Miranda* is a constitutional rule. Even more telling, after considering the merits, the dissent is unable to conclude that *Miranda* 's conclusive presumption is, in fact, required by the Constitution. In the end, the dissent poses only the following rhetorical question: "If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts." *Post* at 50. As noted above, the Supreme Court has stated in unmistakable terms that the rule set forth in *Miranda* is not required by the Constitution. *See ante* at 35-38. In fact, in one of the Supreme Court's most recent applications of *Miranda* to a state court prosecution the Supreme Court specifically stated that "*Miranda* 's safeguards are not constitutional in character." *Withrow v. Williams*, 507 U.S. 680, 690-91 (1993). Thus, although the dissent raises an interesting academic question, the answer to why the Supreme Court applies *Miranda* in prosecutions arising in state courts has no bearing on our conclusion that *Miranda* 's conclusive presumption is not required by the Constitution.

/22 In addition to recognizing the harmful effects created by *Miranda* 's irrebuttable presumption, Congress concluded that the Court's justification for the conclusive presumption - that custodial interrogations were inherently coercive and intimidating - was simply incorrect as an empirical matter. *See* S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112. During the subcommittee hearings, Senator Arlen Specter,

then the district attorney of the City of Philadelphia, pointed out

> that the so-called third-degree methods deplored by the Supreme Court and cited as a basis for their opinion in *Miranda* is not a correct portrayal of what actually goes on in police stations across the country. While there are isolated cases of police using coercive tactics, this is the exception rather than the rule.

Id. at 2134. Similarly, the final committee report concluded that the basis for the conclusive presumption in *Miranda* was faulty. *Id.* at 2142 (noting that the "data supporting the [Court's] conclusion of inherent coercion in custodial interrogation were drawn solely from police manuals and texts which may or may not have been followed"); *id.* at 2134 (noting that "while . . . coercive practices might have been approved 30 years ago, they have no place in modern police techniques"); *id.* (finding that "the Court overreacted to defense claims that police brutality is widespread").

In sum, Congress, utilizing its superior fact-finding ability, concluded that custodial interrogations were not inherently coercive. As Senator Sam Ervin noted at the time § 3501 was enacted:

> A decision of the Supreme Court, if it is based on a factual assumption which is incorrect, may be subject to Congress' power to legislate. The Supreme Court has no right to make . . . determinations based on unsound factual assumptions. I don't believe the great majority of law enforcement officers in the United States are such disreputable people that they have to have the criminals protected against them.

Hearings on the Supreme Court Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong. 25 (1968). Senator Ervin's observation concerning Congress's authority to overrule Supreme Court decisions, whether or not correct as a general matter, is certainly correct when applied to judicially created presumptions. *See ante* note 20. It is well established that a conclusive presumption "should not be applied . . . in situations where the generalization is incorrect as an empirical matter." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). In fact, "the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Id.* According to congressional findings, the basis for *Miranda* 's conclusive presumption is incorrect as an empirical matter, and the presumption does not reach the correct result, *i.e.*, suppressing only coerced confessions, most of the time that it is applied. As a result, Congress, pursuant to its authority to prescribe the rules of procedure and evidence in the federal courts, was justified in abandoning the conclusive presumption when it enacted § 3501.

/23 The agents also found a small quantity of drugs in plain view.

MICHAEL, Circuit Judge, dissenting in part and concurring in part:

Thirty years have passed since Congress enacted 18 U.S.C. § 3501 in reaction to *Miranda*. We are nearing the end of the seventh consecutive Administration that has made the judgment not to use § 3501 in the prosecution of criminal cases. Now, after all this time, the majority supplants the Department of Justice's judgment with its own and says that § 3501 must be invoked. After making that judgment call, the majority holds that the section is constitutional, without the benefit of any briefing in opposition. In pressing § 3501 into the prosecution of a case against the express wishes of the Department of Justice, the majority takes on more than any court should. I therefore respectfully dissent from the parts of the majority opinion that deal with § 3501. As for the search warrant, I would uphold it under *Leon* 's good faith exception, but I dissent from the holding that the warrant is sufficiently specific.

I.

The majority begins its reach to inject § 3501 into this case with an overstatement. It says that the § 3501 issue is "squarely presented." Ante at 2; *see also* ante at 4 ("the question of whether § 3501 governs the

admissibility of confessions in federal court is squarely before us today"). In its brief to us the government has said plainly, "we are not making an argument based on § 3501 in this appeal." Appellant's Opening Br. at 34. The defendant, of course, does not mention § 3501. Thus, we are not being urged to inject § 3501 into this case by anyone except the *amici*, the Washington Legal Foundation and the Safe Streets Coalition. That is not enough to put the issue of § 3501's constitutionality and application squarely before us. Perhaps [Page 48] the majority recognizes as much, for it quickly moves to an argument about why the court itself should force § 3501 into this case.

The majority's argument for taking up § 3501 is as follows. First, the Department of Justice will not defend the constitutionality of § 3501, so the question whether the statute or *Miranda* governs the admission of federal confessions will not be decided unless we act on our own. Second, Dickerson's confession in this case is admissible under § 3501 but not under *Miranda*. "As a result," the majority concludes, "we are *required* to consider the issue now." Ante at 26 (emphasis added). One thing I am sure of is that we are not required to consider a § 3501 issue when it is raised only in an *amicus* brief. *See Davis v. United States*, 512 U.S. 452, 457 n.* (1994) ("declin[ing] the invitation of some *amici* to consider" § 3501). Indeed, the only issues not raised by the parties that we are required to consider are those of subject matter jurisdiction and justiciability. *See e.g., Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278 (1977) ("we are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction"); *Juidice v. Vail*, 430 U.S. 327, 331 (1977) ("Although raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III"); *LaFaut v. Smith*, 834 F.2d 389, 394-95 n.9 (4th Cir. 1987) (concluding that whether a claim is moot "is a jurisdictional question that the court is obliged to consider *sua sponte* whenever it arises") (citations omitted). We have jurisdiction in this case, and it is fit for adjudication. The real question, therefore, is whether we should exercise our discretion and consider § 3501, when no party has invoked the statute. I believe that the situation calls for the exercise of judicial restraint; we should stay away from the § 3501 issue.

To start with, I cannot agree with the majority's accusation that the Department of Justice "elevat[ed] politics over law" when it prevented the United States Attorney from invoking § 3501 in an effort to save Dickerson's confession. *See* ante at 4. A move to admit more confessions could be touted as aggressive prosecution, so I would think it might be better politics to invoke § 3501. In any event, I see no evidence that the Department of Justice is putting politics over law when it comes to § 3501. The Department's view - that § 3501 cannot be [Page 49] used to admit confessions that *Miranda* would exclude - is a view that I accept as genuine.

I believe that *Davis v. United States*, 512 U.S. 452 (1994), remains sound authority for us to decline consideration of § 3501 on the invitation of an *amicus*. In *Davis* the Court did not take up § 3501 because "the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position." *Id.* at 457 n.*. Our panel majority says that everything has changed since *Davis* because the Attorney General has now written Congress, saying that the Department of Justice will not defend the constitutionality of § 3501. *See* ante at 3-4, 25. I do not think the Attorney General's letter changes anything. It simply confirms what the Supreme Court already knew in *Davis*, that is, that the Department of Justice was not going to invoke the statute to try to salvage confessions. *See Davis*, 512 U.S. at 463 (Scalia, J., concurring) ("This is not the first case in which the United States has declined to invoke § 3501 before us - nor even the first case in which that failure has been called to its attention."). The majority also contends that *Davis* is distinguishable because the Supreme Court saved that confession on another ground, making consideration of § 3501 unnecessary. That is not why the Court declined to consider § 3501. The Court said specifically "that the Government has not sought to rely in this case on 18 U.S.C. § 3501, . . . and we therefore decline the invitation of some amici to consider it." *Davis*, 512 U.S. at 457 n.*. *See also id.* at 462 n.* ("the Court today bases its refusal to consider § 3501 not upon the fact that the provision is inapplicable, but upon the fact that the Government failed to argue it") (Scalia, J., concurring). Thus, we are faced with essentially the same situation that the Supreme Court confronted in *Davis* when it refused to take up § 3501: the government has expressly declined to "mak[e] an argument based on § 3501 in this appeal," Appellant's Opening Br. at 34, and we are free to reject *amici* 's call for its

consideration.

It is a mistake for our court to push § 3501 into this case for several reasons. First, courts as a general rule do not interfere with the executive's broad discretion in the initiation and conduct of criminal prosecutions. *See generally United States v. Armstrong,* 116 S. Ct. 1480, 1486 (1996); *United States v. Juvenile Male J.A.J.,* 134 F.3d 905, 907 (8th Cir. 1998). Forcing the use of § 3501 upon a United States Attorney [Page 50] gets uncomfortably close to encroaching upon the prosecutor's routine discretion. I recognize, of course, that courts have a large measure of control over the course of a case once it is filed. But a decision not to invoke § 3501 in response to a motion to suppress a confession is a matter of prosecutorial strategy. We should leave that to the executive. There is also a related point. In invoking § 3501, the majority overrides 30 years of Department of Justice prosecutorial policy. Any change in this policy should come from Justice.

Second, it is "a sound prudential practice" for us to avoid issues not raised by the parties. *See Davis,* 512 U.S. at 464 (Scalia, J., concurring). This is because "[t]he premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). We perform our role as neutral arbiter best when we let the parties raise the issues, and both sides brief and argue them fully. That did not happen here. By invoking § 3501, the majority injects into this case the overriding constitutional question of whether § 3501 can supersede *Miranda.* It then decides the question against the defendant, when the only briefing we have on the issue is about two pages from *amici* that the majority agrees with. The majority holds that § 3501 governs the admissibility of confessions in federal court because *Miranda* is not a constitutional rule. I don't know whether it is or not, but before I had to decide, I would want thoughtful lawyers on *both* sides to answer one question for me. If *Miranda* is not a constitutional rule, why does the Supreme Court continue to apply it in prosecutions arising in state courts? *See, e.g., Stansberry v. California,* 511 U.S. 318 (1994) (per curiam); *see also Mu'Min v. Virginia,* 500 U.S. 415, 422 (1996) (noting that with respect to cases tried in state court, the Supreme Court's "authority is limited to enforcing the commands of the United States Constitution"). This question illustrates that the § 3501 issue is so sweeping that we should not be delving into it on our own. In this case, we should follow our usual practice of deciding only the issues raised by the parties. /* [Page 51]

The majority's fallback position is that if we do not press the use of § 3501, no one else will. *See* ante at 26. This overlooks Congress. If another branch is to question and investigate the executive's 30-year policy of not using § 3501, it should be Congress. After all, Congress - consistent with separation of powers principles - uses the public hearings process to examine the policies and conduct of the executive. That process has been used on occasion to question the executive's exercise of prosecutorial discretion and the formulation of litigation strategy. *See Ameron, Inc. v. United States Army Corps of Engineers,* 809 F.2d 979, 991 n.8 (3d Cir. 1986). Congress therefore may legitimately investigate why the executive has ignored § 3501 and what the consequences are. The legislative branch is better equipped than we are to investigate, for example, the question raised by Justice Scalia in his concurring opinion in *Davis:* whether the government's failure to invoke § 3501 *"may* have produced . . . the acquittal and the nonprosecution of many dangerous felons." *Davis,* 512 U.S. at 465 (emphasis added). Whether the answer to that question or other considerations should be used to prod the executive into changing its policy with respect to § 3501 is a matter that I would leave to Congress.

Because I would not invoke § 3501, I would affirm the district court's order denying the government's motion to reconsider the admissibility of Dickerson's confession for the reasons stated in part II.A. of the majority opinion.

II.

As for the physical evidence seized from Dickerson's apartment, I agree with the majority's conclusion that it should have been admitted [Page 52] under the good faith exception. I respectfully disagree, however,

with the majority's conclusion that a warrant permitting a search for "evidence of the crime of bank robbery" is sufficiently particular under the Fourth Amendment.

A warrant must guide the executing officer with a particular description of the items to be seized. *See United States v. Wolfenbarger,* 696 F.2d 750, 752 (10th Cir. 1982) ("A description is sufficiently particular when it enables the searcher to reasonably ascertain and identify the things authorized to be seized.") (citation omitted). Thus, a warrant authorizing seizure of "address books, diaries, business records, documents, receipts, warranty books, guns, stereo equipment, [and] color television which are evidence of violation of Georgia State Statute 16-8-2 Theft by Taking" is sufficiently particular because it identifies the universe of items to be seized. *See United States v. Fawole,* 785 F.2d 1141, 1144 (4th Cir. 1986). On the other hand, a warrant for seizure of "'any other evidence relating to the commission of a crime ' plainly is not sufficiently particular with respect to the things to be seized." *United States v. George,* 975 F.2d 72, 75 (2d Cir. 1992).

I recognize that courts on occasion have upheld warrants authorizing the seizure of the "instrumentalities" of certain distinctive crimes. Nevertheless, I believe "evidence of the crime of bank robbery" is far too general. That description does nothing to confine the discretion of an executing officer, especially if the warrant is relayed for execution by an officer who has never served on a bank robbery squad. A search for evidence of bank robbery would surely include a search for guns, masks, and cash. But what else? It might be construed to allow a search through all financial records, as well as a search for any items purchased. Under this interpretation, virtually no piece of paper or property would be beyond the bounds of a search. The description in the warrant here was simply too general to satisfy Fourth Amendment standards.

FOOTNOTES

/* The majority misses my point when it erroneously suggests that I have examined all of the relevant authority and cannot conclude that *Miranda* renders § 3501 unconstitutional. *See* ante at n.21, 42. My point is that we should not be examining the question at all, much less deciding it. For the record, however, not everyone agrees with the majority. *See* 1 Charles Alan Wright, Federal Practice and Procedure § 76 (2d ed. 1982) ("Unless the [Supreme] Court overrules Miranda, or holds that the 1968 statute [§ 3501] has successfully accomplished this, lower courts must follow the decision rather than the statute."); 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.5(e) (1984) (§ 3501 "is unconstitutional to the extent that it purports to repeal *Miranda.")*.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CRIMINAL NO. 97-159-A
	)	
CHARLES THOMAS DICKERSON,	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby Ordered that:

(1) Defendant's Motion to Suppress is GRANTED at to his statements offered at the FBI Field Office on January 27, 1997, and items discovered during the search of his home that evening;

(2) Defendant's Motion to Suppress is DENIED as to the search of his Oldsmobile Ciera; and

(3) the clerk shall forward copies of this Order and Memorandum Opinion to counsel of record.

/s/
UNITED STATES DISTRICT JUDGE

July 1, 1997
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CRIMINAL NO. 97-159-A
	)	
CHARLES THOMAS DICKERSON,	)	
	)	
Defendant.	)	
	)	
	)	

MEMORANDUM OPINION

This matter is before the Court on Defendant Charles Thomas Dickerson's Motion to Suppress. For the reasons set forth below, Defendant's Motion is GRANTED in part and DENIED in part.

Facts.

Defendant was arrested on January 27, 1997 and subsequently charged with Conspiracy to Commit Bank Robbery, three Counts of Bank Robbery in violation of 18 U.S.C. §§ 2113(a) and (d), and three counts of Use of a Firearm During a Crime of Violence, in violation of 18 U.S.C. 924(c). He now moves to suppress his confession and evidence seized during searches of his house and automobiles.

On January 24, 1997, a NationsBank in Alexandria, Virginia was robbed. Shortly thereafter, and prior to the occurrence of events germaine to this Motion, Federal Bureau of Investigation

("FBI") Special Agent Christopher Lawlor ("Agent Lawlor"), the lead agent on the case, learned that the robbery had been "committed with a large, silver, semi-automatic handgun and a black leather backpack . . . , that approximately $876 was taken in the robbery, and that no dye pack or bait money was given to the robbers." Lawlor Aff. at ¶ 4. Moreover, witnesses had seen one of the robbers, later identified as James Rochester ("Rochester"), leave the bank and get directly into a Oldsmobile Ciera ("Ciera") positively identified as belonging to Dickerson.

Working from the witnesses' description of the getaway car, including its tag number, Agent Lawlor and several other local and federal law enforcement agents and officers arrived at Dickerson's Takoma Park, Maryland apartment at approximately 5:30 on the afternoon of January 27, 1997. They identified the Ciera used in the robbery and a Chevrolet Caprice also registered to Dickerson parked nearby. A little over an hour later, the agents and officers knocked on Dickerson's door.

At this point, Agent Lawlor's version of events differs substantially from Dickerson's.

According to Agent Lawlor, only four officers and agents came into the apartment and, despite the fact that the officers and agents had been afforded over an hour to plan their encounter with a suspected armed robber in his own home, Agent Lawlor did Lawlor did not have his gun drawn, and "didn't expect one way or the other" whether his colleagues would have theirs drawn. Tr. at 27. After some delay, Dickerson opened the door and allowed the agents and officers in. The agents and officers then asked Dickerson if he would come with them to the station. Dickerson agreed, but asked if he could retrieve his coat from the bedroom. When Dickerson turned to get his coat from an adjoining room, Agent Lawlor and another agent followed him "for their safety." Tr. at 10.

As Dickerson picked up his coat from the bed, the agents observed money later determined to be $552 fall onto Dickerson's bed. Dickerson told the agents that the money consisted of gambling winnings from a recent trip to Atlantic City and put the money in his coat pocket. The officers and agents in the house observed no other incriminating evidence or contraband. They asked Dickerson for permission to search the house, but he refused. He then accompanied the officers to the FBI field office in Washington, D.C.

According to Dickerson's account of events, about 10 agents and officers came to his apartment with their guns drawn, although only a few entered, including Agent Lawlor. Dickerson testified that the officers and agents entered uninvited. He further testified that he felt he had no choice but to accompany

the officers to the station.

Once at the station, Dickerson was interviewed by Agent Lawlor and another agent. Initially, Dickerson denied any involvement in the robbery, admitting only that he had been in the vicinity of the bank when the robbery occurred.

At one point, Agent Lawlor left the interview room and called United States Magistrate Judge for the District of Maryland James E. Kenkel to obtain a search warrant for Dickerson's home. As probable cause for the warrant, Agent Lawlor described the circumstances of the robbery and the fact that the getaway car had been traced to Dickerson. In addition, Agent Lawlor noted that Dickerson, who had been behind on his rent, had just made a $1,350 payment to his landlord, and that Agent Lawlor had seen the $552 addressed earlier. Moreover, Agent Lawlor asserted that exigent circumstances existed because "Mr. Dickerson is not under arrest at this point, and is free to go home. Ah, should he go home, ah, we believe that is, that, ah, he could destroy evidence of the robbery. . . ." Tr. of Telephonic Aff. Judge Kenkel found "probable cause to believe at the residence there may be. . .evidence of. . .the bank robbery in question." Id. During the colloquy between Judge Kenkel and Agent Lawlor, there was no discussion whatsoever of what in particular would be sought. Tr. at 25. The warrant itself only offered that there was reason to believe that "evidence of the crime of bank robbery" would be found at Dickerson's house.[1] The warrant was approved at 8:50 p.m.

At the hearing on this Motion, Agent Lawlor testified that when he talked to Judge Kenkel, Agent Lawlor knew that the $552 was no longer in Dickerson's residence, but was in fact at the station. Tr. at 24. In fact, Dickerson had already allowed Agent Lawlor to count, inspect, and seize the money. Tr. at 10-11. Agent Lawlor further testified that he had seen no other incriminating evidence and that "he had no way of knowing" what the searchers would find. Tr. at 25-26.

After obtaining the warrant, Agent Lawlor dispatched other agents and officers to conduct the search of Dickerson's house, instructing them to look for "evidence of the crime of bank robbery." Lawlor Aff. at ¶6. Agent Lawlor then returned to the

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[1] At the hearing, Agent Lawlor testified:
Question by AUSA Spencer: On the front, face sheet of the warrant, there's a section about the items to be seized or searched for. Who wrote the information in that section?
A: I did.
Q: Did you decide what words to put in there or did someone else decide?
A: No, someone else.
Q: Who was that?
A: The Judge.
Tr. at 15. There is nothing in the transcript of the telephonic application for the warrant to support Agent Lawlor's sworn testimony.

interrogation room, and told Dickerson that his house was about to be searched. Tr. at 15. Dickerson then decided that he wanted to offer a statement. Tr. at 16. "At that point," Agent Lawlor testified, Dickerson was read his rights, waived them, and signed a rights-waiver form. That form was marked as being executed at 9:41 p.m. According to Agent Lawlor, Dickerson then offered the statement that is the subject of the present Motion.

Dickerson's account of events at the FBI Field Office materially differs only in that he asserts that he gave his statement before being read his rights and signing the rights-waiver form.

The subsequent search of Dickerson's home revealed the silver .45 caliber handgun allegedly used in the January 24 robbery, dye stained money and a bait bill from another robbery, and other evidence. Gov't. 2d Sup. Mem. at 6.

On March 28, 1997, Agent Lawlor obtained warrants to search each of the cars present at Dickerson's house. The affidavit attached to the warrant specified that items sought included:

a. A black leather backpack, and its contents;
b. Currency;
c. Clothing and disguises;
d Items stained by dye from explosive dye-packs;
e. Firearms, ammunition, and pellet guns;
f. Money or cash straps;
g. Demand notes;
h. Carrying bags;
i. Photographs, in particular, photographs of co-conspirators;
j. Address books, Rolodexes, or other documents containing names of co-conspirators; and
k. Evidence of the disposition of cash obtained in bank or armed robberies.

From the Ciera identified by witnesses to the January 27 robbery, agents recovered a black leather backpack and solvent used to clean dye-stained money. Nothing of note was recovered from the search of the Caprice, which will not be considered further.[2]

II.

Dickerson seeks to exclude statements he made to Agent Lawlor at the FBI field office and items recovered from the search of his home, asserting that government conduct violated rights protected by the Fourth and Fifth Amendments to the Federal Constitution.

A. Dickerson's Fourth Amendment Claim.

Since 1984, analysis of motions to suppress evidence allegedly obtained in violation of the Fourth Amendment is a two-step analysis. See United States v. Leon, 468 U.S. 897, 913 (1984). First, the Court considers whether a violation of the Fourth Amendment in-fact occurred. Second, if the Court finds a

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[2]Dickerson's challenge to the search of his Ciera does not detain the Court long. Even if the Court were to hold that all of Dickerson's statements were illegally obtained and that the search of his house was in violation of the Fourth Amendment, probable cause for search of the Ciera exists based solely on the admissions of James Rochester and the testimony of the witnesses who identified the cars. See California v. Acevedo, 500 U.S. 565 (1991).

constitutional violation, the Court must determine if the law enforcement officers nonetheless acted in good faith. If the government prevails on either prong of this test, the evidence may not be suppressed. Id.; see also Massachusetts v. Sheppard, 468 U.S. 981, 990 n.6 (1984) (officer who applied for warrant, expressed questions about the warrant's validity, and conducted the ensuing search was reasonable in relying on a magistrate judge's assurances that apparently defective warrant was "sufficient in form and content"). Both determinations are questions of law. See United States v. George, 975 F.2d 72, 77 (2d Cir. 1992).

1. The Warrant was Invalidly Vague.

In order to be valid under the Fourth Amendment, a search warrant must "particularly describ[e] the place to be searched and the persons or things to be seized." U.S. Const. Amend. IV. This provision was crafted as a bulwark against general warrants employed by British colonial officials. Stanford v. Texas, 379 U.S. 476, 481 (1965). A sufficiently particular warrant describes the items to be seized in such a manner that "nothing is left to the discretion of the officer executing the warrant." Id. at 485 (quoting Marron v. United States, 275 U.S. 192, 196 (1927).

In Andresen v. Maryland, the Supreme Court held valid a warrant seeking a long list of specified items "together with other fruits, instrumentalities, and evidence of crime at this (time) unknown." 427 U.S. 463, 482 n. 10. The crime charged in Andresen was a "complex real estate scheme" involving a specific piece of land. There, the Court carved out an exception to the particularity requirement so that "[t]he complexity of an illegal scheme may not be used as a shield. . . ." Id.; see also United States v. Wuagneux, 683 F.2d 1343, 1348-49 (11th Cir. 1982) (taking into account the "practical necessities" in assembling the "paper puzzle" incumbent on solving "white collar crime").

The Andresen exception does not apply here, for three reasons. First, the warrant in Andresen was sufficiently particular to get searchers headed in the right direction, focusing them on "evidence relating to 'the crime of false pretenses with respect to Lot 13T.'" Searchers here had no such guidance. Second, the crime charged here is a simple bank robbery, not a "complex scheme." Evidence of the crime of bank robbery could include many ordinary household items and personal effects that the government knew were not associated with this crime. Finally, while the warrant in Andresen sought evidence the precise nature of which was unknowable at the time the warrant issued, Officer Lawlor and his colleagues knew the amount of cash taken and the description of the pistol and backpack used in the robbery before visiting Dickerson.

Nor is this case like United States v. Robertson, 21 F.3d 1030 (10th Cir. 1994), a car jacking case relied upon by the government,

in which the Tenth Circuit upheld a warrant authorizing the seizure of four specific, easily distinguishable items "and other instrumentalities and fruits of the crime of armed car jacking." 21 F.3d at 1031. In Robertson, the victim "told the agent that the property missing from his car included those four items, but he could not recall and specifically describe the rest of his things, most of which were clothing." The Court held that

> even a 'warrant that describes items to be seized in broad and generic terms may be valid if the description is as specific as circumstances and nature of the activity under investigation permit.' The agents tried to get a detailed description from [the victim] before seeking the warrant. However, [the victim] was distraught and could not specifically recall more than a few items. Most of his things were so commonplace that [the victim] never could have given the agent any distinguishing details about them. Furthermore, because on agent had already interviewed Robertson about the crime, Robertson probably would have removed the evidence if the agents had waited to see if [the victim] could better describe his property later.
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> * * *
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> Even if generic descriptions are necessary, however, "the fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and 'warrants are conclusively invalidated by their failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized."

Id. at 1033 (citations omitted).[3] Ultimately, the key to the court's ruling was that the challenged warrant "could not have given the agents any more guidance in determining what they could seize." Id.

Unlike his counterparts in Robertson, Agent Lawlor did not insure that the warrant specified the items that he and others in the government knew were used by the bank robbers, i.e. "a large silver, semi-automatic handgun and a black leather backpack," nor did the warrant give any hint of the amount of money taken from the bank, i.e. "approximately $876."[4] See Lawlor Aff. at 4. Accordingly, the government failed to "describe the items to be seized with as much specificity as the government's knowledge and circumstances allow[ed]." Id. at 1033. Because "warrants are conclusively invalidated by their failure to specify as nearly as

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[3]The government also relies on this passage in an attempt to invoke an "exigent circumstances" exception to the particularity requirement. Along these lines, Agent Lawlor told Magistrate Judge Kenkel that "Our reasons for the exigent circumstances for the, ah, search is that, ah, the, ah, Mr. Dickerson is not under arrest at this point and is free to go home." It strains credibility to believe that the FBI would simply release a person who (1) owns a car used in a bank robbery; (2) admits that he was in the vicinity of the robbery in question at the time it was committed; (3) admits that a passenger in his car engaged in behavior that witnesses attribute to the robber; (4) is subsequently discovered with a large sum of cash; and (5) who agents "believe . . . could destroy evidence" of the robbery. Agent Lawlor was not credible in his testimony before this Court, and apparently was less than forthright with the magistrate judge, as well.

[4]Similarly, the warrant did not even imply these factors, as it might have by specifying "evidence of the crime of bank robbery with respect to the robbery of the Alexandria NationsBank on January 24, 1997." Such language would have brought the warrant closer to the form found acceptable by the Supreme Court in Andresen v. Maryland, 427 U.S. 463, 480 (1976).

possible the distinguishing characteristics of the goods to be seized," the warrant under which agents and officers searched Dickerson's residence was invalid as a matter of law. See id.; see also United States v. Bright, 630 F.2d 804, 812 (5th Cir. 1980) ("It is settled law that generic classifications in a warrant are acceptable only when a more precise description is not possible.")

2. The Officers Executing the Warrant Acted in Bad Faith.

In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court held that evidence seized by officers acting under an invalid warrant may not be excluded solely based on the invalidity of the warrant if the officers acted in "objectively reasonable reliance" on the apparent validity of the warrant. However,

> [t]he Leon Court also outlined four situations in which an officer's reliance on a warrant would not be reasonable:
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> * * *
>
> (4) the warrant was so facially deficient, by failing to particularize the . . . things to be seized, that the executing officers cannot reasonable presume it to be valid.

United States v. Hyppolite, 65 F.3d 1151, 1156 (4th Cir. 1995), (citing Leon, 468 U.S. at 923.)

In Massachusetts v. Sheppard, 486 U.S. 981 (1984), the companion case to Leon, the Supreme Court held that an officer who conducted a search relying on a facially invalid warrant nonetheless acted in good faith. In Sheppard, the officer actually executing the search was the same officer who had sworn out an affidavit particularizing the items sought. The Court held that because the same officer had conducted the search and limited the search to the items in the affidavit, and ignored the impermissibly broad scope of the warrant as issued, the seized items should not be excluded at trial.

The warrant in question here differs in three fatal respects from the situation in Sheppard. First, unlike the detective in Sheppard, Agent Lawlor neither questioned the magistrate judge regarding the apparent overbreadth of the warrant, nor did he receive assurances from the judge that the objectively invalid warrant was valid as issued. Second, and perhaps more importantly, Agent Lawlor neither sought to attach an affidavit to the warrant nor even told the magistrate judge what would be sought.[5] Finally, Agent Lawlor remained at the station while other officers and agents executed the search warrant. He was therefore unable to focus their search based on his personal knowledge of the case.[6]

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[5]The closest Agent Lawlor came to informing the magistrate judge what would be sought was including in his narrative that the robber "displayed a handgun and opened a bag." No further statements by Agent Lawlor either identified these items with any particularity or linked them in any way to the premises to be searched.

[6]In United States v. Curry, 911 F.2d 72 (8th Cir. 1990), the court highlighted the importance for the purposes of Leon of having the officer who applies for the warrant actually conduct

Accordingly, for each of these reasons, the agents and officers who executed this warrant can not be said to have acted with the objective reasonableness required by Leon. See United States v. Towne, 997 F.2d 537, 549 (9th Cir. 1993) (reliance on a warrant is objectively unreasonable if the vagueness of the warrant "leaves [searchers] guessing at their task").

B. Dickerson's Fifth Amendment Claim.

Dickerson's claim that his Fifth Amendment rights were violated requires the Court to determine two issues: 1) whether Dickerson was in custody when he was interrogated and 2) if so, whether he was read the warnings required by Miranda v. Arizona and its progeny.

1. Dickerson was in Custody.

The Supreme Court

> held in Miranda that a person questioned by law enforcement officers after being taken into custody or otherwise deprived of his freedom of action in any significant way must first be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. Statements elicited in noncompliance with this rule may not be admitted for certain purposes at a criminal trial. An officer's obligation to administer Miranda warnings attaches, however, only where there has been such a restriction on a person's freedom as to render him in custody. In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but the ultimate inquiry is simply whether there was a formal arrest or a restraint on the freedom of movement of the degree associated with a formal arrest.

Stansbury v. California, 511 U.S. 318, 321 (1994) (citations and quotations omitted). This "ultimate inquiry" turns not on the officers' intentions or perceptions, but on "how a reasonable man in the suspect's shoes would have understood his situation." Id. at 324 (quoting Berkemer v. McCarty, 468 U.S. 420, 442 (1984)); see United States v. Jones, 818 F.2d 1119, 1123 (4th Cir. 1987). The law in this Circuit is that neither the fact that an interrogation takes place in a police station, nor that the suspect was given a ride to the station by police is, by itself, enough on which to base a finding that a person was in custody. See United States v. Howard, 1997 WL 318068 (4th Cir. June 13, 1997); Jones, 818 F.2d at 1123.

In this case, several armed police officers and federal agents entered Dickerson's home after dark and asked him to accompany them to the station.[7] They then took Dickerson across the state line,

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the search:

> This fact is significant because in assessing whether reliance on a search warrant was objectively reasonable under the totality of the circumstances, it is appropriate to take into account the knowledge that an officer in the searching officer's position would have possessed.

911 F.2d at 78.

[7]This Court lacks the luxury enjoyed by the district court in Howard, where that court was able to rely on the agent's

on a ten-mile ride through the District of Columbia to the FBI field office near Buzzard's Point, in Southwest D.C. He was neither handcuffed, nor arrested, nor told he was not free to go. On the other hand, he was not told that he was free to go. After the interrogation described above, and without leaving the presence of the officers and agents, he was arrested.

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testimony and discount that of the defendant. Here, both the content of Agent Lawlor's testimony, which was impeached by the government's own exhibits, and his demeanor lacked credibility. See United States v. Howard, 1997 WL 318068 at *2 (4th Cir. June 13, 1997). For example, Agent Lawlor dodged questions about whether his colleagues had their guns drawn. It is simply not credible for a well-trained Special Agent of the FBI to assert that, having had over an hour on-scene to plan a confrontation with a suspect in an armed bank robbery after arriving at the suspect's residence, and then another few minutes immediately outside his door after the suspect stalled when learning that they were peace officers, he "didn't expect one way or the other" about whether his colleagues would have their weapons drawn. Tr. at 27. Because of Agent Lawlor's untruthfulness, and the government's successful impeachment of much of Dickerson's testimony, the Court has pieced together a picture of the events of January 27, 1997 based on the uncontroverted documentary evidence and the Court's assessment of the relative veracity of Dickerson and Agent Lawlor regarding individual disputed factual issues. It is this first-hand assessment of witness credibility, based on demeanor, voice inflection and a totality of other factors not well reflected by an inanimate record, for which the district court is uniquely suited. United States v. Oregon State Medical, 343 U.S. 326, 339 (1952); see also Broadcast Music, Inc. v. Havana Madrid Restaurant Corp., 175 F.2d 77, 80 (2d Cir. 1949) ("A stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried." (quotations and citations omitted)).

The Court holds that Dickerson was in custody when taken from his residence in the dark of a winter night by armed officers and agents, driven across state lines, interrogated at a location ten miles distant from his home, on the far side of a large and dangerous urban center. Under these circumstances, Dickerson's "freedom of movement" was as restricted as if he had been arrested - he could either stay in the warmth and light of the FBI field office or be cast off into the dark and danger of the Washington night.[8] Moreover, the only circumstance of Dickerson's encounter with the agents that night which would have changed had he been arrested at the outset rather than the end is that he would have been read his rights earlier. To allow law enforcement officers to circumvent Miranda by merely delaying their inevitable arrest of a suspect until he or she offers an uncounseled and unwarned confession would ultimately gut the intent of Miranda and its progeny.[9]

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[8]The government makes much of the fact that Dickerson apparently knew that he was empowered to refuse permission to search his house when first asked, and thus must have known that he was free to refuse to accompany the armed officers to the field office. The Court is reluctant to convert the exercise of one's rights protected by the Fourth Amendment into a waiver of those protected by the Fifth.

[9]Courts have also emphasized that the ultimate termination of a suspect's encounter with the police somehow reaches back to color how "a reasonable man in the suspect's shoes would have understood his situation." See Stansbury v. California, 511 U.S.

2. Dickerson was not timely advised of his rights.

It is undisputed that, at 9:41 p.m. on January 27, 1997, Dickerson read and signed a right's waiver form. The question before the Court is whether he read and signed the form before or after making his incriminating statements.[10]

Agent Lawlor testified as follows:

Q. (by AUSA) What did you do after you got the warrant?

A. I notified agents who were in the area that we had a warrant, and I went back and told Mr. Dickerson that we were about to search his apartment.

* * *

Q. What was the defendant's reaction when you told him there was a warrant to search his apartment?

A. He decided that he wanted to talk to me again.

Q. At that point, did you read him his rights?

A. Yes, I did.

Tr. at 16. On cross examination, Agent Lawlor tried to stretch the time between his getting the warrant and his notice to the Defendant to "several minutes." Even accepting that he didn't directly tell Dickerson and "at that point" Mirandize him, Agent Lawlor's testimony is in direct conflict with the documentary evidence, which shows that the warrant issued at 8:50 p.m., and Dickerson's testimony that he was Mirandized at the end of "a half hour" long interview. Based on the documentary evidence and the Court's assessment of the credibility of the defendant and Agent Lawlor, the Court finds that Dickerson was not advised of his Miranda rights until after he had completed his statement to the government. Accordingly, those statements will be excluded from use during the government's case-in-chief.

An appropriate Order shall issue.

/s/
UNITED STATES DISTRICT JUDGE

July 1, 1997
Alexandria, Virginia

318, 324 (1994) (citations omitted); see also United States v. Jones, 818 F.2d 1119, 1123 (4th Cir. 1987) ("At the conclusion of the interviews, appellees left the police station together and remained free until the indictment was filed approximately one month later."). Dickerson was arrested at the end of his interview.

[10]It is also not disputed that statements made prior to the issuance of the warrant were unwarned. Accordingly, those statements are inadmissible for the purposes prohibited by Miranda.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CRIMINAL NO. 97-159-A
	)	
CHARLES THOMAS DICKERSON,	)	
	)	
Defendant.	)	
	)	
	)	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby Ordered that:

(1) Government's Motion to Reconsider is DENIED;

(2) Defendant's Motion for Reconsideration is DENIED; and

(3) the clerk shall forward copies of this Order and Memorandum Opinion to counsel of record.

/s/
UNITED STATES DISTRICT JUDGE

August 4, 1997
Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CRIMINAL NO. 97-159-A
	)	
CHARLES THOMAS DICKERSON,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on cross Motions of Defendant and the United States which ask this Court to reconsider its Order of July 1, 1997 granting in part Defendant Charles Thomas Dickerson's Motion to Suppress. For the reasons set forth below, both Motions are DENIED.

Facts.

Defendant was arrested on January 27, 1997 and subsequently charged with Conspiracy to Commit Bank Robbery, three Counts of Bank Robbery in violation of 18 U.S.C. §§ 2113(a) and (d), and three counts of Use of a Firearm During a Crime of Violence, in violation of 18 U.S.C. 924(c). On July 1, 1997, this Court granted in part Dickerson's Motion to Suppress certain evidence. Specifically, the Court held that Dickerson's confession was elicited in violation of his rights protected by the Fifth Amendment, and that a search of his home was conducted in violation

of rights protected by the Fourth Amendment. The Court's holding was based in part on its finding that Dickerson's in-court testimony was more credible than that of FBI Special Agent Christopher Lawlor.

In its Motion for Reconsideration, the Government introduces new affidavits that seek to undermine both the Court's holding that Dickerson's rights were violated and the Court's finding that Agent Lawlor's testimony lacked credibility.[1]

Standard of Review.

As there is no provision in the Federal Rules of Criminal Procedure governing motions for reconsideration, the Court will be guided by the standard set in the Civil Rules. Federal Rule of Civil Procedure 59(e) allows "an aggrieved party to file a motion to alter or amend a judgment within ten days of its entry." Hutchison v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). "[C]ourts interpreting Rule 59(e) have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law." Id. In examining the motion to reconsider, the Court is mindful of the fact that "[t]he purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3rd Cir. 1985), cert. denied, 476 U.S. 1171 (1986). "In order to support a motion for reconsideration, 'the movant is obliged to show not only that ... evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered or produced such evidence at the hearing.'" Boryan v. U.S., 884 F.2d 767, 771 (4th Cir. 1989) (quoting Frederick S. Wyle P.C. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985). Therefore, evidence brought to the Court's attention which was available to the movant prior to an entry of judgment is "not a basis for granting a motion for reconsideration as a matter of law." Id.

It is within the sole discretion of the Court as to whether the granting of a motion to reconsider is appropriate. Id. at 771. A motion to reconsider cannot appropriately be granted where the moving party simply seeks to have the Court "rethink what the Court

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[1]In support of his Motion to Reconsider, Dickerson argues that the Court should suppress evidence obtained during the search of Dickerson's Oldsmobile Ciera, the car identified by witnesses as having been used in the Alexandria robbery. The Court based its ruling on both the eyewitness accounts and testimony of James Rochester. Dickerson now argues that Rochester's testimony is fruit of a tree tainted by Dickerson's constitutionally invalid confession. In light of the Fourth Circuit's ground breaking decision in United States v. Elie, 111 F.3d 1135 (4th Cir. 1997), this argument is without merit. Moreover, the search of the Ciera is sufficiently supported by the eyewitness accounts and the inevitable discovery doctrine. See United States v. Nix, 467 U.S. 431 (1984). Accordingly, Defendant's Motion for Reconsideration is DENIED.

ha[s] already thought through--rightly or wrongly." Above the Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983).

Analysis.

In the present Motion, the Government has done little more than present new evidence without even arguing that the evidence now set forth was unavailable at the time of the hearing. This failure is fatal to the Motion. At the August 1, 1997 hearing of this Motion, the Government indicated that the Assistant United States Attorney had very little time to prepare Agent Lawlor for his earlier testimony;[2] that the Government anticipated that Agent Lawlor's testimony would sufficiently summarize the testimony of the other agents, whom the Government admits were available to testify but whom it chose not to present; and that Agent Lawlor did not review prior to the hearing the documentary evidence that ultimately undermined his testimony. According to the Government, "[Agent Lawlor] didn't obviously look at those documents, and he obviously wou[illegible]'t lie about it when it's documented like that. So I think that was just an error on his part." The Court does not sit to clean up a party's failure properly to gather, prepare, present, or argue its evidence.[3]

Aside from presenting incompetent evidence, the Government asks the Court to re-evaluate Agent Lawlor's testimony in light of the fact that he apparently broke his neck in a 1996 hockey accident and is thus unable to turn his head. The Court's assessment of Agent Lawlor's veracity was based on the content of his testimony and the cadence, tone, and inflection of his voice, and was aided by defense counsel's adept impeachment. The Court assumes that none of these factors was affected by his disability.[4]

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[2]Defendant's original Motion to Suppress was filed on May, 19, 1997. The Government responded on May, 23, 1997, and supplemented its response on May, 29, 1997. The hearing was held on May 30, 1997. The Government filed a supplemental memorandum on June 3, 1997.

At the hearing of this Motion, the Government affirmed the Court's observation that "this is one of those deals where they threw the case at [the AUSA] at 4:00 on the day before [the hearing]."

[3]The Court notes that some of the evidence now brought forward more closely corroborates Dickerson's account of events than Special Agent Lawlor's. For example, Agent Wenko asserts that he had his weapon drawn when he confronted Dickerson. That is the material point that Dickerson's counsel was trying to elicit from Agent Lawlor at the hearing and about which Agent Lawlor denied knowledge. In addition, the Government's Motion misses the point regarding Agent Lawlor's assertion to Magistrate Judge Kenkel that a telephonic warrant (and an incomplete one at that) was necessary because Dickerson soon would be free to go home and destroy evidence. The Government clearly is correct in arguing that police are not required to arrest any suspect for whom they have probable cause. However, the Government may not use its volitional decision not to arrest as the basis for a claim of exigent circumstances.

[4]The Government begins its plea for reconsideration by asserting that "[a]t stake here is not only our ability to bring Dickerson to book for multiple armed robberies, but also quite possibly an agent's career." More correctly, what is at stake

The district court is uniquely positioned to judge the credibility of a witness before it based on the witness's testimony and all of the evidence properly before it. However, the Court may only make this determination based on evidence that is actually presented.[3]

Because the Government has not proffered any new and heretofore unavailable evidence supporting reversal of this Court's July 1, 1997 Order, the Government's Motion for Reconsideration is DENIED. Because it finds no support in the law, Defendant's Motion for Reconsideration also is DENIED.

An appropriate Order shall issue.

/s/
UNITED STATES DISTRICT JUDGE

August 4, 1997
Alexandria, Virginia

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here is the liberty of a citizen who is presumed to be innocent and whose constitutionally protected rights were breached by the government. At the end of the day, and regardless of the outcome of the trial of this case, Agent Lawlor will not spend the next several years in prison -- Dickerson may.

[3]While the Government's failure to properly bring its case may be unfortunate for both Agent Lawlor and the immediate interests of justice, the Court owes a greater and abiding duty to protect the judicial processes that in turn protect us all. The Court may not abandon this duty in deference to "its own sense of justice." See United States v. Perkins, 108 F.3d 512, 515 (4th Cir. 1997).

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
April 14, 1999

No. 97-4750
CR-97-159-A

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

CHARLES THOMAS DICKERSON

Defendant - Appellee

WASHINGTON LEGAL FOUNDATION; SAFE STREETS COALITION; OFFICE OF THE PUBLIC DEFENDER FOR THE DISTRICT OF MARYLAND; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AMERICAN CIVIL LIBERTIES UNION

Amici Curiae

ORDER

Appellee filed a motion to recall and stay the mandate in this matter pending the filing of a petition for writ of certiorari to the United States Supreme Court pursuant to FRAP 41(d).

The Court grants the motion.

FOR THE COURT

/s/ Patricia S. Connor

CLERK

NITED STATES COURT OF APPEALS

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Plaintiff - Appellant

v.

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Defendant - Appellee

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Amici Curiae

CORRECTED ORDER

The appellee filed a petition for rehearing and rehearing en banc.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc.

Judges Murnaghan, Ervin, Michael, Motz, and King voted to rehear the case en banc. Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Hamilton, Luttig, Williams, and Traxler voted to deny rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Williams for the Court.

FOR THE COURT

/s/ Patricia S. Connor

CLERK